***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 74-1860

*To be argued by*
ELKAN ABRAMOWITZ

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# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1860

P/S

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

GEORGE STOFSKY, CHARLES HOFF, AL GOLD and CLIFFORD LAGEOLES,

*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF ON BEHALF OF APPELLANTS GEORGE STOFSKY AND AL GOLD


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3

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## CORRECTIONS OF TYPOGRAPHICAL ERRORS IN BRIEF ON BEHALF OF APPELLANTS GEORGE STOFSKY and AL GOLD

1. On Page iii, the citation to *Blumenthal v. United States* should be "332 U.S. 539 (1947)".
2. The citation to "A. 483a" on Page 11 should be "A. 438a".
3. The citation to "A. 108a" at the end of the third full paragraph on Page 28 should be "A. 180a".
4. The citation to "A. 789a" at the end of the first footnote on Page 44 should be "A. 799a".
5. The reference to "*United States* v. *Harrison*" on Pages v and 79 should be "*United States* v. *Harriss*". In addition, the words "to be proscribed." should be added to the end of the quotation and the citation should be corrected to read 347 U.S. 612, 617 (1954).

Official citations are now available for the following two cases:

(i) *United States* v. *Nixon*, cited on pages 50, 63 and 64—418 U.S. 683 (1974).

(ii) *People* v. *Maynard*, cited on page 44 n**— 363 N.Y.S. 2d 384 (Sup. Ct., N.Y. Co. 1974).

## TABLE OF CONTENTS

TABLE OF CASES

STATUTES CITED



OTHER AUTHORITIES

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

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## BRIEF ON BEHALF OF APPELLANTS GEORGE STOFSKY AND AL GOLD

### Preliminary Statement

Indictment 73 Cr. 614, in thirty counts, was filed in the United States District Court for the Southern District of New York on June 21, 1973 and named as defendants the four defendants-appellants herein, George Stofsky, Charles Hoff, Al Gold and Clifford Lageoles, officials of the Furriers Joint Council, the union representing organized fur workers in New York. In essence, the indictment charged the defendants with accepting illegal payments in violation of the Taft-Hartley Act, 29 U.S.C. § 186(b) (Counts 2-22, naming various of the defendants in separate counts), and multiplied these misdemeanor charges into felony charges of: (1) conducting the affairs of the Union through a "pattern of racketeering activity" in violation of Title 18, United States Code, 1962(c) (Count 23, naming defendants Stofsky and Gold); (2) conspiracy, in violation of Title

18, United States Code, § 371 (Count 1); and (3) tax evasion for failure to report the same payments, in violation of Title 26, United States Code, § 7201 (Counts 25 and 26, naming defendant Stofsky; Counts 27 and 31, naming defendant Hoff; Counts 32 and 33, naming defendant Gold). Count 24 charged defendants Stofsky and Gold with obstruction of justice, in violation of Title 18, United States Code, § 1503. There were no counts 28 through 30.*

All defendants pleaded not guilty on June 28, 1973.

Trial on this indictment before the Honorable Lawrence W. Pierce, United States District Judge, and a jury began on February 11, 1974, during the course of which Counts 8, 13, 21, 22 and 31 were dismissed by the Court for failure of proof. The trial ended on February 27, 1974, when the jury rendered verdicts of guilty on all the remaining counts. On April 22, 1974, all defendants moved for a new trial on the ground of newly discovered evidence and for a judgment of acquittal. Judge Pierce denied both motions, first from the bench before sentencing on May 31, 1974 (A.

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* This indictment superseded indictment 73 Cr. 257, in 48 counts, which had been filed on March 27, 1973 and had named as defendants the four defendants herein, together with three other union officials and Sam Sherman, Harry Hessel, Karl Schwartzbaum and Sol Cohen, fur manufacturers about whom there was much testimony in this trial. The filing of indictment 73 Cr. 614 was accompanied by the filing of indictment 73 Cr. 615, which charged six union officials, including defendants Stofsky, Gold and Lageoles, with violations of Title 18, United States Code, Sections 1962(c) and 1951 relating to an incident in January, 1972 involving the enforcement of some terms of the Collective Bargaining Agreement, and the filing of indictment 73 Cr. 616, which charged the four fur manufacturers with violations of Title 29, United States Code, Section 186(a). A motion to dismiss Indictment 73 Cr. 615 on the authority of *United States* v. *Enmons*, 410 U.S. 396 (1973), is pending in the United States District Court.

779a)* and later in a memorandum and order dated June 12, 1974 (A. 791a).

On May 31, 1974, the Court sentenced defendant Stofsky to a total term of imprisonment of three years, and a fine of $2,000 on each of counts 2-5 and $2,500 on each of counts 23 and 24, for a total committed fine of $13,000.00.

On the same date, the Court sentenced defendant Hoff to a total term of imprisonment of three years, and a fine of $2,000 on count 27 and $1,000 on each of counts 1, 6, 7 and 9-12, 18-20, for a total committed fine of $12,000.00.

Defendant Gold was sentenced to a total term of imprisonment of two years, and was fined the sum of $2,000 on each of counts 2-5 and 23 for a total committed fine of $10,000.00.

Defendant Lageoles was sentenced to a total term of imprisonment of two years, but execution of his sentence was suspended and he was placed on probation for a period of two years. Additionally, he was fined in the sum of $500 on count 1 and $250 on each of counts 6, 7, 9-12 for a total committed fine of $2,000.00.

The Court ordered that all sentences and fines be stayed pending the hearing and determination of all appeals, except that defendant Lageoles has commenced service of the period of probation.

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* References preceded by "A" refer to the Appendix; "GX", to a government exhibit; "DX", to a defense exhibit; "T", to the transcript of the trial; "R", to items contained in the record on appeal; "Ct. Ex." to a court exhibit.

## Statement of Facts

### Introduction

Despite the apparent complexity of the indictment, the charges in this case essentially concerned the activities of eight out of six hundred Union manufacturers in the fur industry, of whom only three testified at the trial. These three and an alleged intermediary for the remaining five, testified that these few manufacturers had engaged in conduct in violation of their Collective Bargaining Agreement (hereinafter sometimes referred to as "the Agreement") with the Furriers Joint Council of New York, and sought to explain that conduct by claiming that they had paid bribes for the right to do so.

The defendants—all of whom testified on their own behalf—vigorously denied receiving any bribes, and contended in general that the government witnesses were moved to lie about their conduct to obtain sanction for their own criminality which was excused in total by the government,* and by anti-Union bias engendered by aggressively pro-labor conduct of the defendants and the aggressive way in which they had enforced the provisions of the Agreement. Specifically, with respect to the intermediary, management representative Jack Glasser, the defendants urged that if any manufacturer about whom he testified gave him money under whatever pretext he devised, he kept all of it, relying on the Union's inability to police all violations of the Agreement.

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* Although several of the government's witnesses admitted various criminal violations, none was prosecuted. Indeed, the principal government witness, whose testimony—subsequent to trial—was conceded by the government to have been perjurious, has not been prosecuted, even though such perjury was clearly excluded from the transactional immunity granted him (see pp. 25-29, *infra*).

The government's case concerning alleged payoffs rested solely on the uncorroborated word of three witnesses, each of whom said he acted independently of the others. In some instances, documentary evidence introduced by the defendants at the trial established, or at least strongly suggested, several outright lies. And after the trial, the government itself—faced with documentary evidence discovered by defense counsel—conceded that Glasser, its principal witness—had committed perjury concerning financial matters that went to the heart of the defense contention that he kept all monies given him by manufacturers. (See Point I, *infra.*) Therefore, because there were a number of conceded factual errors by the government, a more complete statement of facts than would otherwise be necessary is required here.

## I—Background

### A—The Industry

The events relevant to the trial occurred from 1967 to 1972 when—as now—the fur industry was divided between Union and non-Union sectors. The Union segment consisted of approximately 600 manufacturers who had entered into a Collective Bargaining Agreement with the Furriers Joint Council of New York which represented some 5,000 workers. Some 300 of these Union manufacturers were members of a trade organization, the Associated Fur Manufacturers Incorporated (hereinafter sometimes referred to as "the Association") which negotiated a Collective Bargaining Agreement as one entity with the Union (GX2).*

The remaining Union manufacturers either belonged to other trade associations—not relevant to this trial—which negotiated separate Collective Bargaining Agreements on

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* All provisions in the Collective Bargaining Agreement relevant to this case have remained basically unchanged. Therefore references will be made only to GX 2.

behalf of their respective memberships, or remained so-called independent union shops, each negotiating their own union contract.

The non-Union segment of the industry was divided into two categories. The first, the non-Union shops—mostly family firms doing their own buying, manufacturing and selling, and generally operating with only a few workers (A. 354a)—were not relevant to this trial.

The second group were so-called "contractors", generally one-man entities, but often employing workers as needed at sub-standard wages and under sub-standard conditions. They existed—and still exist—solely to take work from Union manufacturers, work which would ordinarily be done by Union labor. "Contracting" was premised on the exploitation of cheap labor—usually the most recent immigrants to this country—and posed an obvious threat to both Union jobs and to the great majority of manufacturers who opted for the stability and experience of Union labor (A. 351a-54a).

During the relevant period, there were approximately 300-350 contractors in the industry. Their operations were clandestine, their books—as well as those of the manufacturers who employed them—were generally camouflaged, and their methods of pick-up and delivery were secretive to avoid detection by the Union (A. 358a-59a).

**B—The Collective Bargaining Agreement**

Because it is detrimental to both labor and management, the Agreement prohibits contracting (GX 2, Article XVIII). From the Union's point of view, the reason for the prohibition against contracting is obvious: any work which is given to contractors is work taken from Union labor. And the manufacturers who sign the Agreement prohibiting contracting can and do expect that other man-

ufacturers who are parties to the Agreement will not gain a competitive advantage by engaging in contracting. Thus, it is in both the employers' and the Union's interest to ensure that the prohibition against contracting is uniformly enforced.

Therefore, both groups agree to procedures designed to enforce this prohibition. They mutually participate in the selection of an "Impartial Chairman" for the industry whose function is to mediate disputes which arise between management and labor, including contracting disputes. The Agreement provides that contracting complaints are first to be investigated jointly by Union and Association representatives, and then, if an agreement cannot be reached between these representatives, the matter is referred to the Impartial Chairman for decision (A. 356a-57a).

The Agreement contains penalties to be imposed against manufacturers who violate its anti-contracting provisions. In general, those penalties are as follows: for minor or isolated transactions, payment of the labor costs involved plus liquidated damages (a fine) not to exceed $1,000; and if a system of contracting is established, up to three months suspension from the protection of the Agreement for the first conviction or a one year suspension from the protection of the Agreement upon a second conviction (GX 2, Article XVIII, Sec. 7).*

During the relevant period, approximately 100 contracting complaints per year were filed, of which some 25-35 cases a year required the intervention of the Impartial Chairman. The average fine imposed by the Impartial Chairman in these cases was under $1,000 (A. 357a, 399a, 497a).

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* If a manufacturer is suspended from the protection of the Agreement, the "No-Strike" clause becomes inoperable, and the manufacturer could be placed on strike by the Union.

In connection with contracting disputes, the employers also agree to make available payroll, shipping, sales, purchase, production and cashbook records for inspection by the Union and if the Impartial Chairman deems other books or records of an employer relevant to an adequate determination of the issue, he may order investigation of such books (GX 2, Article XVIII, Sec. 5).

Although the contracting clause and the machinery for its enforcement are most important to this case, other provisions of the Agreement are also relevant. One is the prohibition against a Union manufacturer buying from outside sources fur garments of the line made in the firm's shop, a practice commonly called "jobbing". The penalty for jobbing, whether an isolated transaction or a systematic series of transactions, is a fine of $300 for the first offense, and a fine of up to $1,000 and/or up to a three month suspension for subsequent offenses (Article XIV, Section 2(c) and 3; Article XXI, Section 1). Only jobbing from sources "whose workers work under the terms and conditions prevailing in the industry"—or, in reality, from Union sources—is permitted under the Agreement. However, it should be noted that defendant Hoff testified at the trial that upon the advice of counsel to the Union, the jobbing provision—to the extent that it apparently restricts manufacturers to buying only from Union sources—has not been enforced on a concentrated basis for fear that a manufacturer could claim that such enforcement resulted in an unfair labor practice. Consequently, the Union's efforts against jobbing have been severely limited and not nearly as thorough as their efforts against contracting (A. 498a-501a).

The third provision of the Agreement relevant to the trial relates to regulations concerning overtime, which are enforced by the Union in conjunction with the Association, through the use of joint so-called "Overtime Committees" to spot-check various firms. Although the decision as to

which shops to check is solely in the hands of the Union, a representative of the Association must be present when a violation is observed in order for a complaint against overtime to be effective (GX 2, Article VI; A. 128a-29a, 460a-61a).

Finally, it is generally conceded that the benefits flowing to Union members under the Agreement were significantly increased during the relevant period, especially in comparison to related industries (A. 355a-56a).

**C—The Defendants**

The four defendants are officers and officials of the Furriers Joint Council, all having been workers in the industry prior to having been elected—or, in the case of defendant Gold, appointed—to their positions. The Union's Manager, defendant Stofsky, is the chief administrative officer responsible for formulating policy, reporting on the activities of the Union to the legislative body composed of rank and file workers, preparing demands for negotiations, reporting to the membership of the Union at regular membership meetings, and generally supervising the staff (A. 351a).

Defendant Hoff, the Assistant Manager, acts as a member of the Conference Committee which negotiates all contracts. In addition, he acts as the Union's advocate in the impartial machinery set up under the Agreement and is responsible for calendaring cases before the Impartial Chairman. He also serves as a business agent for a small number of firms in the industry (A. 491a-92a).

Defendant Gold is primarily concerned with organizing non-Union shops. In addition, he had general supervisory responsibility over complaints relating to overtime and contracting under the Agreement but had no staff assigned to

him. He spent most of the working day in the fur market itself—in the street and in shops—rather than in the Union offices (A. 460a).

Defendant Lageoles, one of seven business agents, is assigned approximately 100 shops and is generally available to the workers in each of the shops within his district to receive grievances of any sort, including contracting or other complaints from the workers themselves (A. 439a-40a).

## II—The Principal Government Witness, Jack Glasser

The government's principal witness was Jack Glasser, a disgraced and discharged former Association labor adjuster, whose testimony was crucial on 17 of the 25 counts submitted to the jury.* Glasser was one of five labor adjusters, representing management in disputes with the Union, whose jurisdiction was roughly the same size as a Union business agent—approximately 100 shops (A. 49a-50a). Since the government admitted—subsequent to the trial—that he had perjured himself, it is relevant to first set forth how he became the chief prosecution witness against these defendants.

### A—Glasser's Dismissal from the Association

On August 6, 1970, a complaint was filed at the direction of defendant Lageoles charging Sherman Bros., a fur manufacturing firm under contract with the Furriers Joint Council and a member of the Association with a contracting

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* His testimony was relevant to Counts 1, 6-7, 9-12, 14, 15, 18-20, 23, 24, 27, 32 and 33, and not relevant only to Counts 2-5, 16, 17, and 26. Counts 8, 13, 21, 22 and 31 were dismissed at the close of the government's case and there were no Counts 28-30.

violation. Upon receipt of the complaint, one of the principals of Sherman Bros., Sam Sherman, contacted the Executive Vice President of the Association, J. George Greenberg, and began a series of events which eventually led to Glasser's dismissal (GX 60; A. 140a). Essentially, Mr. Sherman complained that he had been giving money to Glasser for a number of years prior to August, 1970, apparently for the purpose of avoiding the type of complaint which had been filed against him by defendant Lageoles (A. 88a-89a, 140a).

Subsequently, Irvin Hecht, then manager of the Association's labor department, conducted an investigation into Mr. Sherman's allegations about payment of money to Mr. Glasser, and visited various firms who were members of the Association, finding that a number of them had been giving money to Glasser. He testified at trial that he had asked the firms whether Glasser had told them, or whether they knew, that any of the money given to Glasser had been passed on to any Union official and their answer—invariably—was that although they gave money to Glasser, they did not know what he did with it (A. 483a).*

Glasser had been hospitalized at the time of the Union complaint against Mr. Sherman. Upon his release a few weeks later, Greenberg and Hecht confronted him with the results of their investigation. Glasser denied receiving *any* money from *any* manufacturer and "emphatically" denied passing on any money to any Union official. But, since Greenberg and Hecht had admissions from manufacturers that money had been given to Glasser, they told Glasser that his pension with the Association would be in jeopardy unless he admitted receipt of this money and told them

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* Ultimately, when the results of Hecht's investigation became known throughout the industry, the Union was able to concentrate on some of the firms determined to have been paying Glasser, and successfully prosecuted them for contracting in violation of the Agreement. (See, *e.g.*, GX 61, A. 455a.)

whether any of it had been passed on to any Union official. Mr. Glasser was so outraged by the suggestion that any money had been passed on to Union officials that he threatened to go to the Union and tell them that the leadership of the Association had offered him a bribe to sign a *false* statement that he had been giving money to the Union (A. 435a-37a).

Mr. Glasser refused to sign any statement—even one admitting that he took money from manufacturers—and was fired by the Association in September, 1970. Moreover, he was denied his Association pension despite his 34 years employment, an event which he conceded at trial left him "more than a little bitter" (A. 437a, 90a, 91a, 139a-44a, 168a).*

Outraged by the denial of his pension, to which he felt entitled regardless of the complaints which had been made against him, Glasser sought legal advice in connection with a potential lawsuit against the Association. In that connection, Glasser asked defendant Hoff to recommend an attorney to him,** and defendant Hoff, through another attorney, was recommended to Irving Anolik, a New York City attorney, with whom they met together in November, 1970. Glasser swore that defendant Hoff paid Anolik—presumably an indication of defendant Hoff's consciousness of guilt—but Anolik testified that although he received a check from one of them, he could not recall from whom.

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* This pension was completely separate from the "industry pension" referred to in Count 24; the Union had nothing whatever to do with the Association pension (A. 459a).

** Defendant Hoff testified that Glasser was so distraught over the actions of the Association that he threatened to expose the fact that he had furnished copies of Association documents to the Union over the years unless defendant Hoff helped recommend a lawyer to him. This, according to defendant Hoff, as much as compassion, led him to help Glasser at this time (A. 508a-09a; GX 25A; DX G).

The relevant bank statements produced by the defense—available to but never subpoenaed by the government—revealed that neither defendant Hoff nor the Union paid Anolik. Glasser said he had destroyed all of his records (GX 26; DX AE, AF, AG, AH, AI, AP, AQ, AR; A. 91a-94a, 208a-12a, 164a-65a).

### B—The Strike Force Investigation and the Alleged Obstruction of Justice (Count 24)

In February 1972, the New York Joint Strike Force began investigating the fur industry with particular emphasis on an incident in January 1972 concerning the Union's efforts to combat contracting. The investigation was publicized throughout the industry (A. 361a-62a, 429a, 95a-96a).*

In February or March, 1972, Glasser received a telephone call from a Detective Civitano, who requested a meeting to discuss matters concerning the fur industry. According to Glasser, after several unproductive meetings with government officials, interspersed with alleged meetings with defendants Stofsky, Hoff and Gold **—during which they assertedly told him not to say anything to the government—a Strike Force attorney, Gerard Hinckley, apparently offered Glasser immunity on April 4, 1972 ***—*before* he had implicated anyone in any wrongdoing (A. 95a-98a, 103a-04a).

Armed with a grand jury subpoena (GX 9) and having been promised immunity, Glasser said he contacted defendant Stofsky and asked him to meet him at Tiffie's Restau-

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* This incident ultimately led to the separate charges contained in Indictment 73 Cr. 615. (See n.*, p. 2, *supra*.)

** All three defendants denied meeting with Glasser during the period, although defendants Stofsky and Gold did meet with him on April 4, 1972 at Tiffie's Restaurant. (See pp. 14-16, *infra*).

*** Hinckley was not called as a witness by the government.

rant, a coffee shop in Rego Park, Queens. Glasser testified that defendants Stofsky and Gold came to the meeting at Tiffie's, but that Mr. Hecht, who had been asked to come, did not appear. At the meeting, Glasser claimed he said that he did not intend to be a "patsy", that he needed a lawyer, and that he asked defendants Stofsky and Gold to recommend one to him.* He said that defendant Stofsky then told defendant Gold to call Harold Cammer, the Union's attorney, and that defendant Gold returned after making a telephone call and told them that an attorney by the name of Hammer was recommended to him.** Glasser further testified that defendant Stofsky suggested that he take the Fifth Amendment and further said: "We will help you get your [industry] pension. We will put it through where you don't have to appear before the Committee, the usual okay" (A. 148a).

Glasser said that he was unable to appear on the return day of the subpoena because of illness, and that Mr. Hammer secured him an adjournment, for which Hammer sent Glasser a bill (GX 11) which was never paid. Upon his recovery, Glasser did testify in the grand jury implicating defendants herein for the first time (T. 286-88).

The above testimony formed the entire basis of Count 24, which charged defendants Stofsky and Gold with obstruction of justice. But this testimony was not only at variance with the testimony of defendants Stofsky and Gold, it was also contradicted by documents readily available to the government. For example, although Glasser insisted that defendants Stofsky and Gold had promised support for

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* Count 24 charged that the defendants "offered" an attorney to Glasser, not that he asked them for one. (See Point V, *infra*).

** Arthur Hammer shared offices with Harold Cammer, but had no other relationship with him (A. 326a).

his industry pension during the alleged April 4, 1972 meeting at Tiffie's Restaurant, the unrefuted documentation introduced by the defense established that Glasser's pension had *already been approved* in October 1971 and that a letter to that effect had been mailed to him at that time (DX Y; DX Z; DX AA; GX 8). In fact, the Acting Executive Secretary of the Health & Retirement Fund of the Fur Industry testified on the defense case that because of Glasser's uninterrupted length of employment in the fur industry and because of his age, he was *automatically* eligible for his pension; nothing the Union or the Association could have done on April 4, 1972 could have prevented his receiving it (T. 378; A. 458a-59a; T. 1434).

In addition, the records of the Health & Retirement Fund clearly revealed that Glasser had already started receiving his pension payments on April 1, 1972—three days *prior* to his alleged conversation with defendant Stofsky at Tiffie's Restaurant. Thus, Glasser's testimony that he did not begin to receive his industry pension until approximately one year after his meeting with defendant Stofsky at Tiffie's Restaurant was clearly perjurious—perjury which could easily have been avoided by the government investigation (T. 1433, 286).

Defendant Stofsky did not deny meeting, at Glasser's request, in Tiffie's Restaurant on April 4, 1972, but his account was quite different. He testified that he was in Hecht's office on that afternoon and received a telephone call from Glasser asking that both meet him at the restaurant in Queens. Hecht apparently could not attend and defendant Stofsky asked defendant Gold—who was familiar with Queens—to drive him to the restaurant. Defendant Stofsky testified that Glasser told him at the restaurant that he was quite concerned about his problems with the Internal Revenue Service and that the Strike Force Attorney, Mr. Hinckley, was concerned about money he had obtained from manufacturers and not reported on

his income tax.* He conceded that Glasser had asked him to recommend an attorney and that he did ask defendant Gold to call Cammer which ultimately resulted in Hammer's representing Glasser. But, he said, he made no offer whatever either to pay Hammer or to reimburse Mr. Glasser for any payment to Hammer, and that there was no mention of Glasser's pension at all (A. 362a-66a).**

### C—Glasser's Substantive Testimony

Pressed to explain the monies he had received from manufacturers, Glasser claimed that a portion of each payment was given to various Union officials during the period 1967 to 1969. He testified about separate conversations and receipts of approximately $15,000 from six manufacturers: Sam Sherman, Harry Hessel, Sam Baker, Karl Schwartzbaum, Sol Cohen and Daniel Ginsberg. Of these, only Daniel Ginsberg testified at the trial, although all, with the exception of Mr. Baker who was dead, were available to do so

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* Glasser at first testified that he could not recall if the subject of the Internal Revenue Service came up during his original conversation with Detective Civitano, but, when pressed on cross-examination, admitted that it did. And Glasser's potential problems with the Internal Revenue Service, had he not cooperated with the government, were enormous (see pp. 25-29, 37-41, *infra*). Thus, at least to this extent, defendant Stofsky's version was corroborated (A. 145a-46a, 331a-32a).

** Glasser testified that defendant Gold said nothing of substance at the Tiffie's meeting. Further, defendant Gold testified that although he did call Cammer at defendant Stofsky's request, he was not in his office at the time. He did not reach Cammer until about 7:00 p.m. that evening, a fact confirmed by Cammer, who testified for the government. Cammer testified that he gave defendant Gold Hammer's telephone number, and that Hammer later told him he had contacted Glasser or his son and obtained an adjournment for him. He said that the Union did not pay Hammer's bill in connection with his services for Mr. Glasser (A. 150a, 467a-68a, 324a-26a).

had the government chosen to give them use immunity.* Consequently, only Glasser's word as to the substance of the transactions between himself and these manufacturers was before this jury, with the exception of Ginsberg who testified only that he had given money to Glasser, without actual knowledge of whether Glasser pocketed the money, as the defense contended, or passed it on, as he testified (A. 198a).**

**1.—Sherman Bros. (Counts 1, 6-8, 23 and 27)**

Glasser said that in the summer of 1967 he had a conversation with Ben Sherman, one of the principals of the Sherman Bros., during which Ben Sherman asked whether he could get him permission to give out some work to contractors.*** After this conversation, Glasser said he

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* Sherman, Hessel, Schwartzbaum and Cohen were indicted on the testimony of Mr. Glasser. Their trials were scheduled to proceed subsequent to the trial of the four Union officials. After the verdict in this case, Sherman, Hessel and Cohen entered pleas of guilty to the charges against them; Schwartzbaum stood trial and was convicted. All received fines, none was sentenced to imprisonment. At the time they entered their pleas of guilty, Messrs. Sherman, Hessel and Cohen said they had no knowledge as to whether Mr. Glasser pocketed the money they paid him or actually passed it on as Glasser testified in this case.

** Ginsberg testified as follows:

> "Q. And with respect to the one thousand dollar payment that you made to Mr. Glasser, you don't know what Mr. Glasser did with this money, do you? A. No. . . .
>
> Q. For all you know, Glasser could have pocketed that money? A. That's true" (A. 198a).

*** The defense counsel produced documentary evidence, equally available to the government, proving that Ben Sherman died on January 13, 1966. Consequently, this conversation, if it took place at all, could not have taken place in the summer of 1967. But, on cross-examination, even when confronted with the fact that Ben Sherman had died a year and a half prior to the time Mr. Glasser had said he had this conversation with him, Mr. Glasser refused to change his testimony (DX AO; A. 107a-08a).

went to defendant Hoff, and told him of Sherman's request, to which defendant Hoff agreed. Glasser said he thereupon went back to the Sherman brothers and they agreed to pay $1,000 per year to give out contracting, the payments to be made in semi-annual installments, one in July and one in December. Glasser said that after he spoke with defendant Hoff, he also told defendant Gold of the Sherman arrangement.* Glasser also testified that sometime in 1969, he received a telephone call from Sam Sherman indicating that defendant Lageoles had entered his shop, noticed a number of coats on racks in Sherman's vault, and became suspicious that goods were being manufactured by contractors. Glasser said he went to the Sherman shop, told defendant Lageoles to wait outside, requested and received $100 from Sherman and gave it to defendant Lageoles. Thereafter, he said, the $1,000 a year was divided four ways with Mr. Glasser keeping one quarter and defendants Hoff, Gold and Lageoles receiving the remainder (A. 51a-59a).**

Glasser had some difficulty explaining the contracting complaint that was filed against Sherman Bros. on January 10, 1968—during the period when Sherman was supposedly paying him. At that time, Sherman Bros. was fined $200, and Glasser said he deducted that amount from his next payment. But he could not explain why the complaint was filed at all if, in fact, he had paid Union officials to prevent such action. Neither could he explain the fact that defendant Lageoles filed the complaints for contracting in August 1970 against the Sherman firm

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* He did not, however, contact the business agent for the firm, a man named William Woliner—to whom he testified he never gave any money—although in the grand jury, Glasser had said that the business agent was the primary Union official to make out contracting complaints and if the business agent was not paid, payments to higher officials would not prevent contracting complaints (A. 116a-17a, 131a-32a).

** According to Glasser, all transactions with the defendants were separate and independent of each other (A. 65a). See Point II, *infra*.

—despite the fact that Glasser claimed defendant Lageoles had been receiving money on behalf of Sherman for protection against just such Union pressure (GX 3; A. 59a-61a, 19a-20a, 139a).

The defense contended that if it were the fact that Glasser had passed on money he may have received from Sherman to Union officials, the complaint and consequent fine in January 1968, as well as the complaint filed in August 1970, would not have been filed.

**2.—Harry Hessel (Chateau Creations)**
**(Counts 1, 9-13, 23, 27)**

Although for a number of years Chateau Creations had not been manufacturing fur garments but so-called "fake furs", it continued to be under contract to the Furriers Joint Council. Because the company was not a fur manufacturer, the Union was particularly sensitive to the possibility that it could at any time decide to enter into a contract with the International Ladies Garment Workers Union—whose employee benefits were lower—rather than the Furriers Joint Council, resulting in a loss of jobs for the Union. Thus, very little pressure was put on this particular shop by the Union staff (A. 444a-46a).

Nevertheless, Glasser testified that Harry Hessel, principal of Chateau Creations, called him sometime in 1967 and asked him if he could give out work to contractors, since he was not making furs at the time (A. 61a-62a).

Glasser said he spoke to the business agent for the firm, Seymour Atlas—now dead—and then to defendants Gold and Hoff, who, according to Glasser, agreed to the request. Glasser claims he emphasized to defendants Gold and Hoff that Hessel was not a fur manufacturer and should be permitted to send out work to contractors (A. 62a-64a).

Glasser said he then returned to Hessel and agreed on a price of $2,000 a year with quarterly payments in April, July, October and December (A. 64a).

Sometime in 1969, Atlas was removed as business agent for the shop and replaced by defendant Lageoles. Glasser recounted that on one occasion defendant Lageoles entered the firm's premises and allegedly noticed non-Union people working there. He claimed he then persuaded Lageoles to go downstairs, gave him $125—part of the money he said he had just received from Hessel—and "that was the end of the questions about the non-Union help, and that was the end of any other questions." Incredibly, on cross-examination, Glasser claimed that Hessel had kept it a secret from the Union that non-Union people were employed despite the fact that such employment was necessarily well known to all the workers in the shop—Union and non-Union—and certainly to the Union business agent (A. 66a-67a, 127a).

Despite these inconsistencies, Glasser insisted that in 1969 he received four $500 payments from Hessel which he said he shared with defendants Gold, Hoff and Lageoles by giving them $125 each, but he could not recall either the locations or order of the payments (A. 327a).

**3.—Breslin Baker (Counts 1 and 27)**

Glasser testified that Baker called him in July 1968 and asked him for permission to give out some work to contractors. Within a week, Glasser said, he spoke to defendant Hoff and told him of Baker's request, adding that Baker would be willing to pay for such permission. According to Glasser, defendant Hoff agreed. Glasser returned to Baker and they agreed on a price of $1,000 payable twice a year—once in July and once at the end of the year (A. 68a-71a).

Glasser testified that he received two $500 payments from Baker in 1969, of which he kept one-half and gave the other half to defendant Hoff (A. 71a, 73a-74a).

Although the government sought to imply that the Union took no action against Baker subsequent to the alleged payment, one of its rebuttal witnesses, Henry Katcher, testified that the Union had indeed pressed a complaint against Baker for contracting which was ultimately resolved in 1970 by the payment of a fine in the amount of $500 (A. 72a-73a, 608a).

**4.—Karl Schwartzbaum (Counts 1, 18-21, 27)**

Glasser testified that during a conversation with Schwartzbaum in 1968, Schwartzbaum asked for protection for his firm from Union pressure when he "jobbed" (A. 75a-76a).

Glasser said he then contacted defendant Hoff, told him the substance of Schwartzbaum's request, and that defendant Hoff assented. Glasser said he then went back to Schwartzbaum and agreed on a price of $900 a year (A. 76a-77a).

He said he received $900 from Schwartzbaum in 1968 and kept half of it. Glasser further testified that he received three $300 payments from Schwartzbaum in 1969 and that on one occasion he gave $100 to Harry Jaffee, the business agent of the Schwartzbaum firm, who had accidentally noticed evidence of jobbing on Schwartzbaum's premises (A. 77a-78a). Although Jaffee confirmed that he had received money from Glasser during the period 1967 to 1969 concerning the Schwartzbaum shop, he could not remember the exact amount or the circumstances of such a payment (A. 335a-37a).*

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* Defendant Stofsky testified that he had suspected, but could not prove, that Jaffee was corrupt and that he had taken

[Footnote continued on following page]

On direct examination, Glasser testified that he was unaware of any fine imposed upon Schwartzbaum during this period relating to jobbing violations. But documentary information—available to, but not sought by, the government—indicated that in May 1969, during the alleged protection period, Schwartzbaum's firm, along with others, was actually struck by the Union because of jobbing. The strike resulted in a fine to Mr. Schwartzbaum of $400—almost half the alleged payment supposedly made to prevent Union harassment (A. 78a, 121a-22a).

Apparently forgetting Glasser's direct testimony with respect to the dates of alleged payments, the prosecutor, upon redirect examination elicited the obviously erroneous testimony that the May 1969 strike occurred before Schwartzbaum began making payments, although Glasser said the payments had begun in 1968 (A. 170a).

**5.—Sol Cohen (Corinna Furs) (Counts 1, 14 and 23)**

Glasser testified that in 1968, Sol Cohen told him that he wanted his firm to start work earlier than the hours prescribed in the Agreement without being penalized by the Union. Glasser said he then spoke to defendant Gold, who was in charge of overtime violations, and told him of Cohen's request. Glasser indicated that defendant Gold agreed. The price agreed upon between Glasser and Cohen was $100 a month during his "season" and $50 a month during other parts of the year. Glasser testified that under this arrangement he received approximately $300-$400 from Mr. Cohen during 1968 and 1969 and shared these payments with defendant Gold (A. 78a-82a).

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steps—long before the investigation began—to deny him a position with the Master Furriers Guild, whose President confirmed the basis of defendant Stofsky's negative comments (A. 371a, 489a). The defense urged that Jaffee never forgave the Union leadership for vetoing that job.

The defense urged that since overtime violations were only randomly enforced, the odds that Cohen or any manufacturer would get caught, without a complaint by a worker, were slim.

**6.—Daniel Ginsberg (Daniel Furs) (Counts 1, 15 and 23)**

In April 1969, Daniel Ginsberg—at the suggestion of his foreman—met with Glasser and asked if he could arrange permission to give out work to contractors. Glasser reportedly asked Ginsberg to give him a list of names of people he wished to use for contracting, and said he told him that he wanted $1,000 in cash to be paid after the list was approved (A. 83a-85a, 186a-89a).

Subsequently, Ginsberg did give Glasser the $1,000, but without any indication with whom, if anybody, it was to be shared. Glasser testified that he shared the $1,000 with defendant Gold and said that he told defendant Gold the name of a particular contractor that Ginsberg wished to use (A. 189a, 86a).

In October 1969, defendant Hoff, on a trip to California, observed garments later traced to Ginsberg, and became suspicious that Ginsberg was contracting in violation of the Agreement. Thus, on his return to New York, defendant Hoff directed that an investigation be made of Ginsberg's books. Ginsberg testified that although he did engage in contracting after April 1969, he had camouflaged the transactions on his books by indicating that they were for jobbing, rather than contracting (GX 13, 14; A. 501a-02a, 193a-95a).

The government offered in evidence a list of contractors prepared by a Union representative from Ginsberg's books, purportedly to show that the Union had knowledge of this contracting and did not prosecute it. However, the list did not show any such thing, since the books had reflected

mostly jobbing. Indeed, the government's own witness, Sidney Reiss—the Association representative who handled the investigation—confirmed that the evidence had shown only jobbing with the exception of a single contracting transaction involving 14 rabbit garments with a value of $179 (GX 15; A. 201a-03a).

While this complaint was pending, Glasser claimed to have spoken to defendant Stofsky and told him that he had paid defendant Gold $500 to prevent contracting prosecution. He said he urged defendant Stofsky not to prosecute the Ginsberg complaint for fear of a scandal in the market (A. 87a-88a).*

Glasser further testified that he had previously spoken to defendant Gold, but that defendant Gold had told him that there was nothing he could do about the Ginsberg investigation: "I have no control over it," defendant Gold reportedly said. In light of this, Glasser was unable to explain why he had paid defendant Gold at all (A. 87a-88a, 124a-25a).

Indeed, on cross-examination, Glasser went so far as to say that he could not possibly have protected Mr. Ginsberg against being caught for contracting, despite his assertedly corrupt relationships with defendants Hoff and Lageoles, the shop's business agent, with other manufacturers (A. 122a).**

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* Defendant Stofsky denied having such a meeting with Glasser (A. 361a).

** On cross-examination, the following exchange took place:

> "Q. So that you really couldn't have protected Mr. Ginsberg against a business agent finding contracting on the shop, is that correct? . . . A. I couldn't protect him because I had nothing to do with that shop. I mean, if he got caught, that would be his tough luck" (A. 122a).

The Union's decision not to prosecute Ginsberg was actually based not upon Jack Glasser, but upon wholly legitimate reasons. First, as noted, there was a complete lack of evidence of contracting; the evidence revealed only jobbing with the exception of one minor contracting transaction (A. 195a-96a).*

Secondly, Ginsberg had been contemplating starting a new line of manufacture by the end of 1969, and in connection with this, no longer needed certain Union employees. Indeed, Ginsberg had already laid off some employees. Aware of this development, defendant Hoff decided not to prosecute the complaint for fear that harassment of Ginsberg might cause the layoff of a number of additional Union workers (A. 195a-96a, 504a).

That defendant Hoff's judgment in this regard was correct was confirmed by Reiss, who said on the government's case that in his opinion—based upon his long service with the Association—even if Ginsberg had been prosecuted on the evidence then available, he probably would have received only a warning. Thus, rather than irritate Ginsberg at a time when his favor was desired in the overall interests of the Union, he was not prosecuted (A. 202a).

**D—The Concededly Perjured Testimony**

On January 30, 1974, prior to trial, defendants served Jack Glasser with a subpoena *duces tecum* seeking production of his income tax returns and bank documents for the period 1967-1972 (DX I). These documents were crucial to the defense case, because the defendants always contended that no money which Glasser may have obtained

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* The enforcement of the jobbing provisions, it will be recalled, was uncertain. *Supra*, p. 8.

from the manufacturers on whatever pretext, had ever been passed on to the Union officials, and, further, because defendant Stofsky testified that the major subject of the conversation at Tiffie's Restaurant was Glasser's concern over avoiding an income tax prosecution. On the first day of the trial, Glasser produced only his 1972 income tax return. When asked what had happened to the remaining documents called for in the subpoena, he testified that when he moved to Florida in September 1973, he threw out "everything that . . . [he] had no use for . . ." (A. 164a).*

The one tax return which was produced by Glasser indicated interest on income in the amount of $6,151, said to be earned from various savings bank accounts in the New York area. On cross-examination, Glasser confirmed that his interest income was earned from approximately $120,000 deposited in these accounts (DX H; H1). In addition, Glasser's 1972 tax return indicated dividend income on securities testified to by Glasser to be worth about $18,000 (A. 161a-62a).

When asked how he could have amassed such capital on a salary that ranged from $15 a week in the 1930s to $225 a week in 1970, Mr. Glasser testified—later proven to be perjuriously—as follows:

> "Q. When did you receive the $120,000 that you put into the savings banks? A. When did I receive it?
>
> Q. Yes. A. I never received it.
>
> Q. When did your wife receive it? A. Well, my wife happened to be the furrier—a daughter of one

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* "Q. You're telling this Court and jury that you threw out bankbooks? A. Everything.

Q. Cancelled checks? A. Everything that had weight to it.

Q. Bankbooks have a lot of weight? A. Oh, yes.

Q. Very heavy? A. Oh, definitely" (A. 165a).

> of the leading fur manufacturers of the 1930s and 1940s. We were married in 1934. For the first ten years of our married life we lived with our in-laws, my father-in-law and my mother-in-law. They paid for everything, rent, food and clothing. My father-in-law passed away in 1940. He left an estate. Part of it went to my wife. My mother-in-law passed away in 1944. She left an estate. Part of that estate went to my wife. Most of the money belongs to my wife" (A. 163a).

The perjury did not stop there. When asked whether his interest income was reported on his earlier tax returns, Glasser lied:

> "A. Interest income? Mr. Abramowitz, we have reported every nickel that we ever got in interest or otherwise.
>
> Q. Since 1940? A. Every nickel" (A. 166a).

After the trial, Glasser—faced with new evidence discovered by defendants—admitted that he failed to report almost $60,000 in income which he earned from 1967 to 1970 (A. 750a).

Glasser also lied when asked what he did with his share of the total amount of $15,000-$16,000 which he testified he received from manufacturers from 1967 to 1969. He testified at the trial that he did not bank his share but rather spent it, but after the trial—again faced with defendants' evidence—he claimed that money he received from manufacturers was deposited in the bank—his latest attempted explanation for the suspicious cash deposits (A. 743a-44a).

Without checking available documentary evidence which might have suggested that he was lying about the inheritance, the government chose to call on its direct case Betty

Glasser, Jack Glasser's wife. The substance of her testimony in *total* was later admitted by the government to have been perjurious.

Mrs. Glasser testified that upon her father's death she received approximately $60,000 as an inheritance and upon the death of her mother she received another $30,000 to $40,000 as an inheritance. This was subsequently proven false; there was no such inheritance (A. 178a-79a).

She testified that she always held possession of the bank books, and was unaware of any deposits made by her husband without her knowledge. Subsequent to the trial, it was discovered that the bulk of the cash capital of the Glassers was deposited between 1967 and 1969 both by Betty and Jack Glasser (A. 181a-82a, 713a-40a).

Mrs. Glasser also testified that as part of the estate left by her mother she received valuable jewelry which she said she still had. Subsequent to the trial, in an effort to explain away some of the cash deposits discovered by defense counsel, she apparently now says that some of the jewelry was sold and she realized over $10,000 on said sale which she now says was deposited in the bank sometime between 1967 and 1969 (A. 108a, 743a).

While the defendants were able to produce some documentary evidence casting a substantial doubt that the money in the bank accounts of the Glassers came from inheritances from Mrs. Glasser's parents,* they were unable to present to

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* DX AM and DX AN are certified copies of the estate papers of Mrs. Glasser's parents, indicating that Mrs. Glasser, at most, received approximately $1,200 from the estate of her father and at most $1,600 from the estate of her mother. Despite this, the government continued to urge the jury that the inheritance story was the truth stating that the Glassers must have received money from Mrs. Glasser's parents outside the estate and "under the table" and stressing that Glasser had no motive to lie because he had complete transactional immunity. Because of the verdict, it is likely that the jury credited the prosecutor's argument (A. 628a; T. 1884-86).

this jury the later-discovered positive proof that the bulk of the Glassers' savings were deposited *in cash* between 1967 and 1970, not in the 1940's.

The defendants obtained such proof that the Glassers' story of the inheritance was flatly perjurious only after the trial when they were able to obtain deposit slips for the Glassers' accounts. The amount of the cash deposited in this period exceeded by at least five times the total amount of money Glasser testified he received from manufacturers during the life of the alleged conspiracy. Thus, if available to this jury, this evidence would have strongly advanced defendants' contention that Glasser had pocketed all money he obtained from manufacturers and passed none of it on to Union officials.

Upon receiving documentary information subsequent to the trial, defendants made a motion for a new trial, which was denied without argument, without a hearing and partially on the basis of an *ex parte* submission by the government containing details of Glasser's new version of the "facts" (A. 698a-779a, 791a-808a).

**III—Walter Stiel (Counts 1, 16, 17 and 23)**

On March 29, 1968, William Woliner, business agent for Walter Stiel's Union fur manufacturing company, filed a contracting complaint charging that Stiel's firm was giving out contracting to Victor Lust, another Union manufacturer (GX 16).

Stiel denied the contracting charge and claimed that he had merely purchased garments from Lust while his shop was fully employed—the type of "jobbing" permitted by the Agreement. Since Stiel had dealt with Lust, himself a Union manufacturer, there was, according to the

Union, insufficient evidence upon which to prosecute the complaint (A. 592a-93a).

It developed, however, that Lust had apparently given out Stiel's order to contractors, for on November 19, 1968, Lust admitted contracting violations in connection with this transaction and agreed to pay a negotiated fine of $750 and to employ another Union finisher (DX AT).

Stiel testified that Lust had informed him of the fine in November, 1968, but recoiled at the notion that Lust may have asked him to reimburse him for this fine because it was Stiel's—not Lust's—work which was sent to the contractor. Stiel did say, however, that sometime after his conversation with Lust, he met defendant Gold on the street and asked him if the contracting complaint could be settled peacefully. According to Stiel, defendant Gold told him that he would let him know and—a week later—said that he could pay $750 to settle the matter. Stiel testified that he gave defendant Gold $350 in his office with no-one else present and paid the balance of $400 in January 1969 (A. 234a, 216a-18a).

According to Stiel, his partner, Martin Stern, was aware of the arrangement with defendant Gold, but Stern was not called as a government witness. Instead, presumably to corroborate Stiel's testimony, the government introduced a piece of scrap paper from a diary dated March 20, 1969 listing the serial numbers of $350 in United States currency (GX 24). On the bottom of the exhibit was the notation "12/21/68 G", written, Stiel said, by his office girl. Stiel testified that this list represented the money he paid to defendant Gold at the end of 1968 (A. 219a-21a).

Mr. Stiel was unable plausibly to explain, however, why he would be using a calendar for 1969 as scrap paper for events which he said took place in 1968, nor could he ex-

plain why he would have made a list of serial numbers of money he claimed he paid out (A. 219a-20a, 231a-33a).*

**IV—Daniel Grossman (Counts 1-5, 23, 25-26, 32-33)**

Daniel Grossman, now an executive with Richton International, a conglomerate owning a number of fashion production and retail companies with whom Grossman merged in 1972, testified that during the period 1967 to 1972, he was the principal of a number of fur-related corporations including Harry and Dan Grossman Furs, Inc., H & D Grossman, Inc. and several others (T. 650-53).

Grossman's fur operations—like his father's before him—were all non-Union until 1959, when after considerable Union pressure, including strikes and picketing, he unionized one of his corporations—H & D Grossman, Inc. Although H & D Grossman, Inc. did sign the Agreement with the Union, Grossman testified that he continued the other corporations, principally Harry & Dan Grossman, Inc., as non-Union (A. 240a-42a).

Grossman testified that the H & D Grossman, Inc. Union shop manufactured garments worth approximately $350,000 a year with 8-10 Union workers. On the other hand, Harry and Dan Grossman, Inc.,—the non-Union shop—wholesaled garments worth approximately $2,000,000 a year. "Wholesaling", or buying completed garments from smaller manufacturers for resale at a profit, required no workers on the premises of the manufacturing operation. Because of this fundamental difference between the two operations—wholesaling and manufacturing—the Union workers employed by H & D Grossman, Inc., and the business agent,

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* He said he had no knowledge of how the government came to possess GX 24 and speculated that his partner may have given it to the prosecution. When asked about its contents, which more likely represented *cash receipts*, Stiel apparently came up with this explanation (A. 233a).

defendant Hoff, never, during the relevant period, could have had objective evidence that Grossman's operations extended beyond his manufacturing business. Indeed, according to defendant Hoff, attempts to gain access to the books of the non-Union corporations were rebuffed by Grossman himself (A. 241a-43a, 245a, 528a-32a).*

Although Grossman testified that extensive evidence existed that he was contracting through Harry and Dan Grossman, Inc.—the non-Union wholesale operation—he said there was no evidence of contracting on the books of H & D Grossman, Inc.—the Union manufacturing operation (A. 244a-45a).

Despite this almost foolproof system in camouflaging his contracting operation, Grossman testified that he made four $6,000 payments to defendant Gold during 1970 and 1971. He said he met with defendant Stofsky in the early part of 1970 at the Charles Restaurant in Manhattan, at which time he claimed to have informed defendant Stofsky that he had been paying a man named Harry Koch $12,000

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* There is no doubt that the Agreement in effect during the relevant period prohibited Grossman's "double corporation" operation. In those years, the Agreement clearly provided that no employer could share premises with any other firm engaged in the manufacture, production, jobbing, or retailing of fur garments unless such person or firm was in a contractual relationship with the Union (GX 2, Article XIV, Sec. 1). But the Union's theoretical rights to consider all corporations of Mr. Grossman as Union corporations did not substitute for lack of proof that other corporations were operating from the same premises as H & D Grossman, Inc. during the relevant period. In fact, it was not until 1972 when all of Grossman's operations became part of Richton International, that the Union was able to obtain copies of all books relating to Grossman, whereupon he was forced by the Union to take on more Union workers. See pp. 35-36, *infra*.

a year and had had no Union problems.* During this conversation at the Charles Restaurant, Grossman allegedly told defendant Stofsky that he would be willing to continue paying $12,000 a year to prevent any disruption of his business with Union problems (A. 245a-48a).

A few weeks later, according to Grossman, defendant Gold came up to Grossman's premises and told him the price would be $15,000, but Grossman said he balked and told defendant Gold that the price was $12,000. In order to check defendant Gold's authority, Grossman says that he spoke with defendant Stofsky, who apparently told him that he could deal with defendant Gold (A. 248a-49a).

Grossman testified that he made four $6,000 payments to defendant Gold—in April and September of 1970 and 1971 (A. 249a-51a, 255a-56a).

Grossman explained that he generated the large sums of cash used for the alleged payoffs by arranging with skin dealers to submit fictitious or inflated bills to Grossman's companies indicating sales of skins which were either non-existent or on which the price was inflated. Upon his payment of these bills by check, the dealers, according to Grossman, refunded an agreed-upon amount of cash less discounts kept by them (A. 256a-57a; GX 28, 30-35; DX O; P).

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* Harry Koch, who died in early 1970, was neither a Union official nor a fur manufacturer; rather, Grossman testified that Koch was a known loan shark in the industry, from whom Grossman admitted he had once borrowed some money (A. 288a-90a, 367a).

On cross-examination, Grossman revealed that he actually had paid Koch some $24,000-$25,000 a year. Since Koch was not available to testify at the trial, it was never established whether or not Koch, being a loan shark, was threatening Grossman with exposure to the Union of his enormous contracting operation secreted in another set of books under another corporate name (A. 290a-92a).

On Grossman's direct examination, the government produced only invoices and checks from skin dealers which corresponded in time and amount to the sums Grossman said he paid defendant Gold. On cross-examination, however, Grossman admitted that his illicit cash transactions far exceeded the amount he said he paid to defendant Gold —but the government produced no evidence from any of the dealers to prove exactly how much unreported cash Grossman generated during this period (A. 268a-71a, 276a, 292-93a).*

Grossman explained that he used the additional cash to bribe buyers in the industry, but could not give exact figures and precise details as to which buyers were paid and in what amounts. When it was suggested that Grossman might have kept some of the cash for himself, along with a denial, came a concession that such a thought would not be preposterous (A. 271a-76a, 282a-86a).**

There was no corroboration of Grossman's testimony concerning the alleged bribes, even though the government introduced some of Grossman's ledger books for 1970 and

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* Grossman testified to about $80,000-$100,000. When asked by defense counsel to search for and produce the invoices and checks forming the bases of these transactions, Grossman returned the next day with documents said to be from these skin dealers. Coincidentally, the documents he produced, along with those introduced during his direct examination, represented $80,000-$100,000 (DX O; A. 277a-79a, 305a-06a).

In preparing the record on appeal, the government accidentally revealed to defense counsel another such invoice and check, relating to some $56,000 worth of skins, which was not turned over to the defense counsel during the trial, even though all such documents were requested (R. 40). See p. 43 n.*, *infra*.

** Grossman conceded, however, that all these cash and commercial bribery transactions were illegal and could have resulted in a series of prosecutions against him had he not claimed to have given some of this cash to defendant Gold (A. 271a; T. 790-91).

1971 which indicate a large amount of contracting. As noted, defendant Hoff testified that Grossman had denied access to all of his books not related to H & D Grossman, Inc. (GX 37, 38; A. 251a-53a, 521a-22a).*

In the beginning of 1971, Grossman sold his companies to Richton International, merging them all into one entity called "Dan Grossman Fur Division of Richton International". After the merger, the Union was successful in persuading Grossman to increase the number of Union workers in his shop and in examining—for the first time,

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* Defendant Hoff testified that Exhibits 37 and 38 dealt with corporations of which he either was unaware of or which Grossman told him were defunct. In fact, the exhibits themselves are labelled "Harry and Dan Grossman Furs, Inc."—the non-Union corporation—but the pages inside the ledger books indicate "Dan Grossman Corporation", obviously yet another corporate vehicle used by Grossman. Consequently, there was no evidence from the books introduced by the government to indicate that the Union was aware of the large amount of contracting engaged in by Grossman (A. 524a-25a).

Nor did the testimony of Grossman's contractor, William Poulos, corroborate Grossman. Poulos, now employed in Grossman's union shop, testified that on several occasions during the period 1965-1972, defendant Gold visited his premises, sought permission to rummage through his factory, and viewed the skins which were on the premises. Since Grossman's skins were on the premises, and, according to Grossman and Poulos, had Grossman's seal—"DHG"—affixed to them, defendant Gold, it was urged, must have been aware that Grossman was contracting. But, the fact is that no Union official, including defendant Gold, had any right to be on the premises of any contractor since the Union had no contractual relationship with them. Indeed, both defendants Gold and Stofsky testified that attempts to enter the premises of any contractor had often resulted in the police being called, and the most that defendant Gold ever succeeded in his function as an organizer, was to get into the showroom—never the factory. Moreover, even if defendant Gold had seen the seal, there was no testimony that he recognized it or attached any significance to it whatsoever (GX 43; A. 316a-18a, 470a-71a, 404a, 422a, 432a-33a).

according to the defendants—books reflecting the entire scope of his operation, including contracting, ultimately resulting in a fine of $10,000 imposed by the Impartial Chairman (A. 515a-17a, 302a, 266a, 582a, 523a; DX N; GX 36).

## ARGUMENT

### POINT I

**Defendants' Motion for a New Trial Based Upon Newly Discovered Evidence of Perjury Committed During the Trial by the Government's Chief Witness Should Have Been Granted, and Their Convictions Should Therefore Be Reversed and a New Trial Ordered.**

#### A—Introduction

On April 22, 1974, defendants filed a motion for a new trial based upon evidence discovered subsequent to the trial that the chief prosecution witness, Jack Glasser, had committed perjury during his testimony regarding his accumulation of over $120,000 in cash. The defendants urged that their convictions—based, at least in part, upon perjured testimony on a material issue—could not properly be permitted to stand, and that the government had breached its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

Although specifically finding that Glasser had "engaged in an effort to conceal information and had given false, or deliberately misleading, testimony" at the trial, and conceding the documentary evidence would have "had a dramatic impact" if presented to the jury, the court below denied the new trial motion. The trial court held that it could not conclude that "if the jury in the trial just completed had known of this new evidence of cash deposits,

or the fact that Glasser lied about the source of his savings, it would probably have reached a different verdict, an acquittal; or that this new evidence would probably produce an acquittal on retrial" (A. 805a-06a). It is respectfully submitted that this decision was both factually and legally erroneous.

**B—The Factual Basis for the New Trial**

As indicated in the Statement of Facts herein (*supra*, pp. 25-29), the defense in this case was centered upon defendants' contention that while Glasser may have taken money from various manufacturers, he did not pass that money on to the defendants; rather, the defense attempted to show that Glasser deceived these manufacturers into believing that he was making payments to the Union to avoid enforcement of the Agreement's anti-contracting provisions, but that he then kept the money he received for himself knowing that the Union had insufficient staff to police contracting in any event (A. 794a-95a).

Thus, since defendants were attempting to show that Glasser had been keeping the money he took, his financial situation became a highly material issue. In order to obtain information concerning that issue, the defendants—prior to trial—unsuccessfully moved for discovery of Glasser's bank documents and subpoenaed his tax returns for the years 1967 through 1972 as well as all of his other financial records (A. 711a).

On the first day of the trial, however, Glasser produced only his 1972 tax returns (DX H), claiming to have destroyed his copies of all the others. This return revealed the large interest income which led to the explanation on Glasser's cross-examination that his wife had inherited the principal—$120,000—years before (see pp. 26-27, *supra*). Following Glasser's testimony, the government called his

wife as a witness for the sole purpose of corroborating Glasser's explanation of this $120,000, and she affirmed that the money had been inherited more than two decades earlier. Throughout his testimony, Glasser insisted that during the years 1967, 1968 and 1969 he received only about $15,000 or $16,000 from fur manufacturers (A. 167a), of which he said he retained for himself a total of only some $5,000.

Having discovered what the court below referred to as this "small fortune" (A. 801a) which Glasser had accumulated, the defendants first, immediately served subpoenas *duces tecum* on the three banks listed on Glasser's 1972 return, requesting the records of his and his wife's accounts and second, requested that the government produce the remaining original tax returns from the Internal Revenue Service files for their inspection. On February 15, 1974, over the government's objection, the court did order the production of these returns, and they were produced on February 20, 1974 (GX 51; DX S, T). The records produced by two of the banks disclosed accounts that were not opened until 1971 and 1972 and in which there was little activity and no cash deposits. The records produced by the East New York Savings Bank on February 21, 1974 —after the government rested—did show two accounts with considerable activity, including a large number of deposits in the 1967 through 1970 period, but it could not be determined whether these deposits represented cash received between 1967 and 1969. Since the other two bank accounts revealed large transfers of sums from one account to another, there were no good faith grounds upon which to conclude that the sums in the East New York Savings Bank were not similar transfers from other bank accounts of deposits made years earlier. Since the bank transcripts did not on their face contradict the Glassers' sworn testimony that they had received the $120,000 from Mrs. Glasser's parents years before, they would have proved

nothing in themselves, and thus were not introduced into evidence on the defense case.

The defendants, of course, continued to suspect that Glasser's explanation for his wealth was untrue. During the trial, the defendants obtained certified copies of the probate papers from the estates of Mrs. Glasser's parents which revealed no such inheritance, thereby suggesting that the explanation was in fact contrived (DX AM, AN). But even faced with these papers the government continued to insist that Glasser had "no reason to lie" and even urged the jury in summation to disregard the probate papers and credit Glasser's explanation for his wealth (A. 626a-28a).

It was not until March 7, 1974—a week after the trial had concluded—that the East New York Savings Bank was finally able to provide defendants' attorneys with photocopies of actual deposit slips for the Glasser accounts. These deposit slips revealed, for the first time, that the Glassers had in fact made large *cash* deposits during the 1967 through 1971 period. Deposit slips from other banks listed on the earlier tax returns subsequently revealed other substantial cash deposits during the same period. In all, the Glassers had made cash deposits in three banks totalling approximately $57,000, almost half of Mr. Glasser's life's savings and, significantly, far more than the *total* amount of money he said he received from manufacturers and retained for himself. With this evidence, it was then clear that Mr. and Mrs. Glasser had lied in their testimony concerning the source of the $120,000.

A highly likely source of these cash deposits—it is submitted—was the manufacturers from whom Glasser admitted taking payments. And thus, this evidence strongly supports the defendants' contention that Glasser was taking much larger payments from manufacturers than he

testified to, and that he was *in fact* keeping all the money he received rather than sharing it with anybody. This is more compelling because the bank records reveal no cash deposits after August 1970—the month in which the Association uncovered the fact that manufacturers were paying Glasser—despite the fact that Glasser remained in New York for almost three years thereafter.

In opposing defendants' motion for a new trial, the government submitted an affidavit of the Assistant United States Attorney in charge of the prosecution in which he summarized interviews he conducted with the Glassers regarding defendants' newly discovered evidence. When confronted with the fact that the cash deposits conclusively disproved his prior explanation—that the money was inherited years before—Glasser apparently first tried to explain the entire $57,000 by claiming it constituted proceeds from "jewelry sales" (A. 797a). Subsequently, the prosecutor said, Glasser claimed that he had in fact received monies from numerous fur manufacturers in addition to those he indentified at the trial, and that in each instance he passed a substantial portion of these monies to Union officials, usually one or more of the defendants in this case.

No details of these new charges were stated, but in support of this newly contrived explanation, the government—in a highly irregular procedure—submitted to the court an *ex parte* affidavit which it said contained further details of these alleged transactions with the defendants.* Over defendants' vigorous objections (A. 764a), the court relied, in part, upon this sealed affidavit—which defendants had no chance to see or refute—in deciding defendants' new trial motion (A. 803a-04a).

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* Indeed, the fact of the "jewelry sales" explanation was only contained in this *ex parte* affidavit, and was only revealed to the defendants in the court's written opinion denying the new trial motion (A. 797a).

In addition to these newly revealed receipts from manufacturers, Glasser attempted to fill the gaps with some strange explanations of clearly suspicious transactions, none of which were documented or otherwise corroborated in any way (A. 743a-44a). Since no details were given, defendants had no way of ascertaining the truth of these new claims. Perhaps not suprisingly—but most conveniently—the total amount of cash received by the Glassers through these various newly revealed transactions amounted to approximately $57,000.

Most notably, however, the government's affidavit clearly demonstrated—and the government admitted—that Glasser had, in fact, perjured himself during the trial. Since even if his new explanation of the source of his funds is true—and there is no real basis for believing it is—it directly contradicts his trial testimony (a) that his $120,000 fortune came from his wife's inheritance and (b) that the total amount of money he received from manufacturers during the period 1967 through 1970 was about $5,000 and that he never banked any of it (A. 798a). While it may not be surprising that Glasser would attempt to explain his large cash deposits by further implicating the defendants so as not to risk further contradiction, it is unfortunate that the government, and the court below, credited Glasser's new story—again without corroboration—in order to deny defendants' new trial motion.

### C—The District Court Opinion Denying Defendants' New Trial Motion

In its memorandum opinion dated June 12, 1974, the court below found no prosecutorial misconduct and did not discuss the effect of negligent non-disclosure of relevant evidence. The court then held that—despite the independently proven perjury of the government's chief witness—the subsequent explanation of the perjured testimony was sufficient to warrant denial of defendants' motion. Essen-

tially, the court found that because Glasser had now—without cross-examination—explained the cash deposits by implicating the defendants further, defense counsel would be unable to attempt to use the evidence of the cash deposits as substantive support for the defendants' theory at a new trial or even that it could have been used effectively at the prior trial.

The court did not even consider the possibility that Glasser's new explanations may be totally false. Nor did it consider the implausibility of a situation where a fully immunized witness failed to disclose *all* information about the very same defendants he had *already* deeply implicated, and what effect this argument might have had on a jury.

The court also concluded that denial of the motion was required because of "independent evidence" corroborating Glasser's story: one, the testimony of Stiel and Grossman dealing directly with *some* of the defendants and not at all connected to Glasser; two, the testimony of Ginsberg who said that he gave money to Glasser with the "understanding"—from Glasser only— that it was going to Union officials; three, the testimony of Harry Jaffee, a non-defendant ex-Union official who said he had accepted $100 once from Glasser (although there was no link whatsoever between that testimony and the defendants); and four, the relatively small geographical area occupied by the fur industry and inferences therefrom.

It is respectfully submitted that the court's decision was erroneous in two principal respects: first, in its holding that the government had no obligation with respect to this matter under *Brady* v. *Maryland*; and second, in its finding, without an evidentiary hearing, that the defendants' proof of perjury was insufficient to warrant a new trial.

**D—The Government's Failure to Conduct an Investigation and to Disclose Exculpatory Evidence**

Defendants submit that the government was under a duty to turn over exculpatory material in this case, contained in the tax returns of its chief witness, and that duty cannot be absolved by the apparently negligent failure of the government to conduct at least a routine investigation to determine whether its principal witness was testifying truthfully with respect to his allegations. While the duty would not, of course, extend to every detail of Glasser's testimony, it did extend at least to the central question of whether monies received by Glasser were actually passed on to defendants, as he claimed, or whether they were kept by him. And this duty had added significance in this case because none of the alleged payments by Glasser to defendants was corroborated by other witnesses.

The fact is that the new evidence demonstrating Glasser's perjury—discovered by defendants after the trial—could (and should) have been discovered by the government prior to trial had it undertaken a reasonable investigation of records *in its own possession*—the Glasser's tax returns for the years 1967-1972. If the government had examined those returns, it would have discovered, as defendants later did, the incongruous size of his bank accounts in relation to his salary. Under the principles of *Brady* v. *Maryland*, *supra*, and related cases, the government was obligated to have turned over such potentially exculpatory information to defendants prior to trial.* The duty to turn over exculpatory material does not depend upon the presence or absence of a specific request,** nor

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* The government also breached its *Brady* obligation with respect to GX 29 id (*supra*, p. 34 n.*). What is said herein concerning prosecutorial misconduct with respect to the Glasser material, applies equally to this exhibit.

** The defendants did request, in their pre-trial motions, disclosure of all exculpatory material and, specifically, copies of all bank documents relating to Jack Glasser during the relevant period (R. 2).

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In rejecting the contention of the prosecution, and unequivocally holding that the prosecutor had a duty to disclose such information, the court said:

> "Nor is the effect of the nondisclosure neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure." 331 F.2d at 846. *Cf. Giglio* v. *United States*, 405 U.S. 150, 153-54 (1972).

Since the returns were in the "possession" of the government, the failure to disclose them prior to trial resulted in a suppression, even if negligent, of evidence which would clearly have been of material value to the defense, a suppression requiring a new trial wherein the defendants would have the benefit of such information before a jury.

In *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961), this Court held that the government's negligent failure to turn over certain documents which were misplaced by the prosecutor materially handicapped the defendants in their cross-examination of the principal witness thereby requiring reversal of their convictions. On appeal from a denial of defendants' motion for a new trial, the government contended that the missing documents, rather than being useful to the defendants, would have strengthened the case for the prosecution. (The government advanced a similar—though circular—argument here based on the Glassers' "explanations" of the perjury.)

In rejecting the government's contention, this Court noted that the missing file would have benefited defense counsel in cross-examining the government's principal witness, who—as was the case with Glasser here—"at times not only contradicted his prior testimony but also was vague in his recollection . . . ." 291 F.2d at 569. In ordering a new trial, the Court refused to speculate as to what might have developed had the witness been confronted with the missing documents during cross-examination,* and cited its own earlier language in *United States* v. *Zborowski,* 271 F.2d 661, 668 (2d Cir. 1959), language which is equally pertinent here:

> "The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried. In the long run it is more important that the government disclose the truth so that justice may be done than that some advantage might accrue to the prosecution toward ensuring a conviction" (citation omitted). See also, *United States* v. *Keogh,* 391 F.2d 138 (2d Cir. 1968).

In *United States* v. *Miller,* 411 F.2d 825, 830-31 (2d Cir. 1969), this Court held that where a duty to disclose information has not been discharged, a new trial must be granted if there is a "significant possibility that the undisclosed evidence might have led to an acquittal or hung jury. . . ." Finding that such a possibility existed, the Court held that while negligence of the prosecutor in failing to make evidence available to the defense does require some showing of materiality, it noted that the standard is lower than cases in which there was no misconduct. And it

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* Here, it is equally impossible to say what would have developed at the trial had Glasser been confronted with documentary proof later obtained by defendants.

held that the possibility that the information which was not disclosed could have been used effectively for cross-examination was sufficient to warrant a new trial. The Court said:

> "The test . . . is not how the newly discovered evidence . . . would affect the trial judge or ourselves but whether, with the Government's case . . . already subject to serious attack, there was a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." 411 F.2d at 832.

Here, as in *Miller,* had the tax returns of Jack Glasser been turned over to the defense prior to trial, they could certainly have been sufficiently useful to create a "significant chance" that the defense could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.*

It is respectfully submitted that under these well-settled principles relating to prosecutorial suppression of evidence favorable to the defendant, a new trial is clearly required here.

**E—Whether or Not There was any Prosecutorial Misconduct, the Independently Proven Perjury of the Government's Chief Witness Required the Granting of a New Trial.**

Even if this Court should find that the government was not obligated to have turned over the Glassers' tax returns to the defense, it is submitted that the newly discovered evidence of the Glassers' perjury required the granting of a new trial. For, even accepting all the explanations given by the government, it is undisputed that both Mr. and Mrs.

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* While speculation concerning jury deliberations is usually not fruitful, it is significant to note that this jury once reported it was "hopelessly deadlocked" on some counts—all related to Glasser (A. 687a; Ct. Ex. 18).

Glasser committed perjury in their testimony at the trial, and this perjury clearly requires a new trial.

In *Mesarosh* v. *United States,* 352 U.S. 1 (1956), the United States Supreme Court held that where a chief government witness was conceded to have committed perjury —there in a related proceeding—a new trial was required. In that case, the government, conceding the perjury of the witness, had requested that the Court merely remand the case for hearing in the District Court, because it claimed there was sufficient independent evidence of guilt adduced at the trial.

The Supreme Court refused to remand and ordered a new trial, holding that:

> "The dignity of the United States government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial." 352 U.S. at 7.

The Supreme Court specifically held that once perjury of a major witness is conceded, a new trial must be had without regard to whether there was evidence at the trial other than that of the perjured witness sufficient to sustain the conviction. 352 U.S. at 14. See also, *Napue* v. *Illinois,* 360 U.S. 264, 270-71 (1959).

Here, as in *Mesarosh,* the trial was "polluted" by the Glassers' perjury, and the perjury resulted in a taint upon the convictions obtained herein which can only be removed by the granting of a new trial. Since the independently proven perjury was not merely cumulative of other impeachment evidence, and was not merely relevant to collateral matters but related directly to a central part of the defense case, the attempt of the court below to sus-

tain this conviction by reliance upon other non-perjured evidence of defendants' guilt was wholly improper.*

Moreover, under traditional standards governing new trial motions, the decision of the court below denying defendants' motion was erroneous, since it rested upon the unproven assumption that the Glassers' new explanation—the details of which not being disclosed to the defendants—were true, without at least holding an evidentiary hearing. See *Kyle* v. *United States*, 297 F.2d 507, 509 (2d Cir. 1961). But neither the court below, nor this Court, has any way of knowing that, and reliance on such an explanation was simply reliance on pure speculation.

Lastly, even if it were proper for the court to look to other evidence in the case in determining whether to grant a new trial, there was no such evidence here. Of the three manufacturers who testified, two had nothing whatever to do with the transactions involving Glasser and did not corroborate any of his testimony. The third, Mr. Ginsberg, merely corroborated Glasser's testimony as to *receipt* of money, but added nothing to Glasser's claim that he passed such money on to defendants. Mr. Jaffee, a former Union official, merely said that he had taken money from Glasser on one occasion, but said nothing whatever about the defendants. And the fact that the fur industry is centered in a small geographic area provides no corroboration whatever for Glasser's claims. See pp. 57-58, *infra*.

The fact is that Glasser's testimony was uncorroborated: it was his word, and his word alone, that the jury was

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*The government's contention that a new trial is not warranted because Glasser's new charges have precluded effective use of the new evidence by defendants is nothing but speculation. The fact is defendants had absolutely no way of knowing that Glasser would attempt to implicate them further, and have no way of knowing now what Glasser might say at a new trial.

asked to accept. And since his word has now been shown to have been materially false, it is submitted that a new trial must be granted.

* * * * *

In sum, either because of the government's failure to meet its obligation or because of the mendacity of its chief witness—for which it disclaims responsibility—the result is that defendants were deprived of verdicts based upon all the relevant facts. As the Supreme Court unanimously said recently in *United States* v. *Nixon*, 42 U.SL.W. 5237, 5245 (U.S. July 24, 1974):

> "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."

For all the above reasons, a new trial is mandated.

## POINT II

**There Was No Evidence of the Single Conspiracy Charged in Count 1 of the Indictment; The Convictions on That Count Should Be Reversed and Separate New Trials Ordered.**

Count 1 of the indictment charged all four defendants, together with other co-conspirators whose identities were subsequently revealed by the Bill of Particulars (and amendments and supplements to it), with a single conspiracy to violate Title 29 U.S.C. Section 186(b) and Title 18 U.S.C. Section 1962(c). The defendants moved in the court below for a dismissal of the count on the ground that the government's proof showed not one conspiracy but

multiple, separate and distinct conspiracies, which was denied both during and after the trial (T. 1053-1112; R. 15; A. 806a). It is respectfully submitted that the court's rulings in this regard were totally erroneous, and severely prejudicial.

**A—Single—Multiple Conspiracy**

While the government presented much testimony about actual payments of money to the defendants, there was notably little testimony about what individual defendants and co-conspirators knew of the other's actions. In fact, the evidence on the government's own case only supports the inference that all of the defendants and alleged co-conspirators did not know or have reason to know that the others were participating in similar schemes.

Glasser was unequivocal in his testimony that he had kept all his transactions secret from all of those with whom he dealt. There was no testimony that he had ever told any one manufacturer of any other manufacturer's transactions. And as to the defendants, he testified, on the government's direct case, as follows:

> "A. Mr. Sabetta, at no time during all of these transactions did one know that the other was involved. Each one was separate.
>
> Q. You mean you didn't tell them at least? A. For example, I wouldn't tell Mr. Gold that Mr. Hoff was involved or I wouldn't tell Mr. Hoff that Mr. Gold was involved, or that the business agent was involved" (A. 65a).

Neither did Ginsberg's testimony support the inference that he knew that other manufacturers were paying any of the defendants, either directly or through Glasser. Indeed, he said that he did not even know what happened to the money he gave Glasser, and that Glasser could very well have kept it (*supra*, p. 17 n.**). Similarly, Stiel's testimony related strictly to his dealings with defendant Gold; there was

no suggestion at all that he knew of other defendants or manufacturers engaged in similar activities. And, finally, while Grossman did testify that defendant Gold had intimated that other manufacturers were making payments through intermediaries (A. 250a), Grossman did not testify that he conveyed any of this information to any other defendant or manufacturer.

The government's evidence, even in its most favorable light, reveals not one but fourteen separate agreements between individual defendants and individual manufacturers, either in person or with Glasser as an intermediary, each independent of the other and each complete in itself; it simply does not add up to the "single, overall conspiracy" which the government was required to prove in order to sustain Count 1.*

Because the government's evidence so clearly demonstrates multiple conspiracies, classification of the facts into familiar conspiracy labels is difficult, if not impossible.** However, upon analysis the facts do reveal what

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* The fourteen independent transactions—none dependent upon the other for success—are as follows, with reference to the Statement of Facts herein:

(1) Sherman-Glasser-Hoff (pp. 17-19); (2) Sherman-Glasser-Gold (*Ibid.*); (3) Sherman-Glasser-Lageoles (*ibid.*); (4) Hessel-Glasser-Gold (pp. 19-20); (5) Hessel-Glasser-Hoff (*Ibid.*); (6) Hessel-Glasser-Lageoles (*Ibid.*); (7) Baker-Glasser-Hoff (pp. 20-21); (8) Schwartzbaum-Glasser-Hoff (pp. 21-22); (9) Schwartzbaum-Glasser-Jaffee (*Ibid.*); (10) Cohen-Glasser-Gold (pp. 22-23); (11) Ginsberg-Glasser-Gold-Stofsky (pp. 23-25); (12) Stiel-Gold (pp. 29-31); (13) Grossman-Stofsky-Gold (pp. 31-35); (14) Glasser-Gold-Stofsky (cover-up with authorities) (pp. 13-16).

** Conspiracies have generally been classified into three types: (1) the simple conspiracy; (2) the "chain" conspiracy; and (3) the "wheel" conspiracy. See, generally, *Developments in the Law —Criminal Conspiracy*, 72 Harv. L. Rev. 922 (1959); Note, *Fed-*

[Footnote continued on following page]

could be a classic "wheel" conspiracy for the Glasser phase of the case and two, smaller but completely separate, simple conspiracies for the Stiel and Grossman phases. But even the "wheel" fails because there was no evidence that all the co-conspirators knew, or had reason to know, that others were engaging in similar schemes with Glasser; at any rate, the two simple conspiracies are certainly misjoined with each other and with the Glasser phase.

For the Court's convenience, a schematic representation of the government's evidence concerning conspiracy is set forth in an addendum to this brief, following p. 80.

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*eral Treatment of Multiple Conspiracies*, 57 Colum. L. Rev. 387 (1956). The simple conspiracy exists when each conspirator knows the entire scheme and all of the participants in it. See, *e.g.*, *United States* v. *DeSapio*, 435 F.2d 272 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). The "chain" conspiracy—most frequently found in narcotics cases—exists when each conspirator performs one step in a larger scheme, but is charged with constructive knowledge of the entire scheme since he knows (or has reason to know), by virtue of his own role, that others have taken part and/or will take part in the plan to effect a common goal. See, *e.g.*, *United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). The "wheel" conspiracy exists where there is a "hub"—a central figure or group —and individual conspirators or "spokes" who deal only with the hub. Here the spoke conspirators may be charged with knowledge of the entire operation *only* if they know or have reason to know that others are engaged in similar schemes involving the hub. See, *e.g.*, *Kotteakos* v. *United States*, 328 U.S. 750 (1946). The facts of this case as a whole certainly cannot be categorized as evidencing a simple conspiracy because there was no claim ever made that all defendants and co-conspirators knew or had to know the full scope of all of the schemes. And it is equally clear that it was not a chain conspiracy, as there is nothing in any one of the transactions testified to which necessarily required for their goal other schemes to precede or follow them. As indicated in the text, the facts most accurately reflect in part a wheel conspiracy and two smaller simple conspiracies.

In *Kotteakos* v. *United States*, 328 U.S. 750 (1946) and *Blumenthal* v. *United States*, 332 U.S. 539 (1947), the Supreme Court of the United States set forth the standards to apply in resolving single-multiple conspiracy problems. In *Kotteakos*, the Court held that the variance between the single conspiracy charged in the indictment and the multiple conspiracies disclosed by the evidence was sufficiently prejudicial to require reversal. There, a central conspirator named Brown had acted as a broker placing fraudulent applications for loans under the National Housing Act. Various defendants had obtained loans through Brown's services, but each loan and each defendant was independent of the other. The government had contended that though the evidence may have disclosed multiple conspiracies rather than a single one, reversal was not necessary because "the pattern was 'that of separate spokes meeting at a common center . . . .'" 328 U.S. at 755. The Court found, however, that since the spokes were "without the rim of the wheel to enclose [them]", *Ibid.*, reversal was required.

In *Blumenthal, supra,* the defendants had been convicted of conspiring to sell whiskey at unlawful prices in violation of the Emergency Price Control Act. They claimed that there was more than one conspiracy, as they did not know of the existence or participation of an unknown owner in the scheme, nor did they know that two groups of salesmen were involved. The Supreme Court, while affirming the conviction, was careful to distinguish the case from *Kotteakos*, detailing the difference between a single conspiracy and multiple conspiracies:

> "The case therefore is very different from the facts admitted to exist in the Kotteakos Case. Apart from the much larger number of agreements there involved, no two of those agreements were tied together as stages in the formation of a larger all-in-

> clusive combination, all directed to achieving a single unlawful end or result. *On the contrary each separate agreement had its own distinct, illegal end. Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects.* Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of the agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all, comprehensive plan." 332 U.S. at 558 (emphasis added).

It is respectfully submitted that the evidence at the trial in this case clearly falls within the Court's description of multiple conspiracies. Here, as in *Kotteakos,* there was neither any allegation nor any proof that any two of the agreements "were tied together as stages in the formation of a larger all-inclusive combination. . . ." Here, as in *Kotteakos,* there was neither any allegation nor any proof that there was a "single unlawful end or result" to which all of the agreements were directed and there was neither any allegation nor any proof that any defendant helped any other defendant make his deal with Glasser or with any manufacturer. On the contrary, the proof here—as in *Kotteakos*—was that "each separate agreement had its own distinct, illegal end," and that each agreement "was an end in itself, separate from all others, although all were alike in having similar illegal objects." The conspiracies were "distinct and disconnected"; "[t]here was no drawing of all together in a single, over-all, comprehensive plan."

Here, as in *Kotteakos*, there was no proof that one defendant helped another in securing the protection for which the manufacturer was paying. In fact, there was evidence directly to the contrary: It was Glasser, not any defendant, who said he had to pay Lageoles to prevent him from filing complaints against Sherman Bros. and Chateau Creations some time after Glasser said he had paid defendant Hoff and defendant Gold for such protection (*supra*, pp. 18, 20); it was defendant Hoff who started a contracting investigation of Ginsberg's firm sometime after Glasser said he paid defendant Gold to prevent such Union harassment (*supra*, p. 23)*; it was defendant Lageoles, again without interference from the other defendants, who—after he allegedly had been paid—filed the fateful complaint against Sherman which resulted in Glasser's downfall (*supra*, pp. 10-11, 18-19).**

As noted, the government's proof here showed fourteen separate conspiracies between manufacturers and Union officials to pay and receive money. Each of these agreements, as in *Kotteakos*, was an entity unto itself: the Glasser agreements varied as to which provision of the Agree-

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* Defendant Stofsky's alleged agreement with Glasser not to pursue the Ginsberg matter because of defendant Gold's involvement (A. 87a-88a), was, at most, a joining by defendant Stofsky of that particular conspiracy, because nothing was said by Glasser from which defendant Stofsky could have drawn the inference that either Glasser or defendant Gold were involved in any other similar scheme.

** The testimony concerning the alleged obstruction of justice by defendants Stofsky and Gold in 1972 does not support the notion of a single conspiracy. The last of the Glasser-related payments was received around Christmas of 1969; the last of any of the payments allegedly received by any defendants was the last payment made by Grossman in September 1971. Thus, even assuming the existence of a single conspiracy, its goals would have been achieved with the last payment made to a defendant and any later conspiracy to conceal the earlier crimes would be a separate conspiracy as a matter of law. See *Grunewald* v. *United States*, 353 U.S. 391, 399-406 (1957).

ment the manufacturer wanted to violate, the Union official involved, the frequency of payment and the amount of payment. The Stiel arrangement had nothing to do with the Grossman arrangement and *vice-versa;* neither had anything to do with the Glasser arrangements. In sum, the success or failure of any one arrangement had no effect on any other.

In an effort to sustain Count One, the government suggested at trial (T. 1075-76)—and the Court apparently adopted (T. 1063; A. 793a)—a theory in support of a single conspiracy which can only be characterized as guilt by association. The government argued that because of the compact nature of the fur manufacturing industry in New York City, the jury was entitled to infer that everyone in the industry, both Union officials and manufacturers, knew what everyone else was doing. This contention, however, is erroneous, both factually and logically. The evidence dealt only with the activities of eight of six hundred manufacturers of whom only three testified. And, while there was testimony that the fur manufacturing industry is centered in a nine square block area of Manhattan, there was no evidence from which the inference could be drawn that everyone in the industry knew everyone else's affairs. Indeed, the evidence showed that the industry is comprised of over 1,000 Union, non-Union and contracting shops employing well over 5,000 workers in separate premises and is one in which competition between manufacturers is fierce. In fact, the motivation for individual manufacturers to violate the contracting provisions is the economic competitive advantage gained over other manufacturers who comply with the Agreement. Thus, the physical dimensions of the fur market are immaterial since there is no reason why one manufacturer would tell another of his illegal (or even legal) methods of cutting costs.

More importantly, there is surely no basis for the inference that, because of the compact nature of the industry,

any defendant would have known that other defendants and co-conspirators were involved in a bribery scheme—an inference which might be permissible had there been any testimony that there was close supervision of the work of any one Union official by any other or that working conditions were such that any conversation or passing of monies would have had to have been observed by other defendants or co-conspirators. See, *e.g., United States* v. *O'Connell,* 165 F.2d 697 (2d Cir.), *cert. denied,* 333 U.S. 864 (1948). But all the evidence here pointed to wide discretion given each Union official in his duties and to the fact that much of the defendants' time was spent outside of the offices of the Furriers Joint Council in the shops and on the streets of the fur market. Thus, the inference, if any, to be drawn is that any one defendant would probably not know of the activities of co-workers or superiors.

Thus, it is respectfully submitted that there is no basis in the record of this case upon which the conviction for a single conspiracy can be justified. Indeed, in many cases where the facts were much closer to a single conspiracy than this, courts have reversed jury verdicts because the evidence did not support the finding of a single conspiracy. See, *e.g., United States* v. *Varelli,* 407 F.2d 735 (7th Cir. 1969); *United States* v. *Goss,* 329 F.2d 180 (4th Cir. 1964); *Marcante* v. *United States,* 49 F.2d 156 (10th Cir. 1931).

**B—Prejudicial Joinder**

Under the ruling of *Kotteakos* v. *United States,* 328 U.S. 750 (1946), the variance between the indictment and the proof with respect to the conspiracy was inherently prejudicial and was incapable of rectification. The judgments of conviction of all of the defendants on Count 1 of the indictment must be reversed and that Count dismissed.

Reversal of the convictions on the conspiracy count requires new and separate trials for each defendant because

of the prejudicial joinder of both the multiple conspiracies and the remaining counts. While the Supreme Court in *Kotteakos, supra,* recognized that a finding of a few multiple conspiracies where one was charged would not always necessitate reversal, as in *Berger* v. *United States,* 295 U.S. 78 (1935), it did hold that the joinder of *eight* separate conspiracies was inherently prejudicial. *A fortiori,* the joinder here of *fourteen* separate conspiracies was prejudicial. As the Supreme Court said in *Kotteakos*:

> "We do not think that either Congress . . . or this Court . . . intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all. Leeway there must be for such cases as the Berger situation and for others where proof may not accord with exact specifications in indictments. . . . But if the practice here followed were to stand, we see nothing to prevent its extension to a dozen, a score, or more conspiracies and at the same time to scores of men involved, if at all, only separately in them. The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." 328 U.S. at 773-74.

In *United States* v. *Varelli,* 407 F.2d 735 (7th Cir. 1969), the Seventh Circuit faced a problem not dissimilar to the one here. The Court wrote an extensive analysis of the question of prejudice in a multiple conspiracy case and concluded that, in the absence of the conspiracy count to provide the needed nexus, joinder of defendants was im-

proper under Fed. R. Crim. P. 8(b).* It further held that under *Kotteakos, supra* and *Schaffer* v. *United States,* 362 U.S. 511 (1960), it was required that:

> "[A]ll the defendants be retried on the substantive counts since the overwhelming guilt as to some may have unduly influenced the jury as to others who were less involved. The Court in *Kotteakos* stated that where the instructions were not proper, it was possible '[n]ot only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, but also for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some.'" 407 F.2d at 747 (citations omitted).

By failing to dismiss Count 1, the court below permitted the jury to consider the acts and hearsay statements of all defendants and alleged co-conspirators against each other defendant whether or not the particular defendant was involved in the particular transaction.** Had there been separate trials, much evidence which this jury considered against *all* the defendants would have been inadmissible against individual defendants. For example, if defendant Stofsky were tried alone, the vast bulk of the Glasser testimony—and all of the Stiel testimony—would

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* Rule 8(b) of the Federal Rules of Criminal Procedure makes the joinder here of all four defendants, without the presence of the conspiracy count, improper, because there is no "same act or transaction" or "series of acts or transactions constituting an offense or offenses" in which all four defendants are alleged to have been involved. Moreover, without Count 1, the duplicity—charging of more than one crime in one count—of Counts 6, 7 and 9-12 becomes a prejudicial defect because of the misjoinder of the defendants named in those counts. See *Franklin* v. *United States,* 330 F.2d 205, 207 (D.C. Cir. 1964).

** See Point III-B, *infra,* which deals with the inadmissibility of the hearsay statements generally.

have been inadmissible, and so on. Here, as in *Varelli, supra,* the Court should order new individual trials where the prejudicial "spillover" effect of such evidence would be avoided.

Finally, we must note that the immense investment of time, effort and expense by all counsel, the trial court and this Court, could have been avoided had the government looked realistically at its evidence *before* the trial. See *United States* v. *Branker,* 395 F.2d 881, 889 (2d Cir. 1968).

It is respectfully submitted that the lack of any evidence of a single conspiracy requires the reversal of the convictions on that count and the dismissal of the count itself, and that the misjoinder resulting therefrom is prejudicial and requires the retrial of all defendants on the substantive counts of the indictment in separate trials.

## POINT III

### Several Erroneous Rulings by the Trial Court Were So Prejudicial as to Require a New Trial.

### A—The Testimony of Harry Jaffee was Improperly Admitted

On its direct case, the government called Harry Jaffee, a former business agent for the Furriers Joint Council, who testified, in substance, that he had received monies from Jack Glasser after stumbling upon apparent Agreement violations in a Union shop. He did *not* testify that he knew or had been told that other manufacturers were making unlawful payments either directly or through Glasser and he did *not* say he knew or had been told that Glasser was paying the defendants or any other Union officials. Indeed, there was no connection whatever between Jaffee's testimony and the charges in the indictment.

Because of this, defendants moved to strike Mr. Jaffee's testimony as both irrelevant and highly prejudicial. The court denied the motion—after initially granting it—on the ground that although the government had not proven Mr. Jaffee to be a co-conspirator as alleged in the Bill of Particulars, Mr. Jaffee's testimony was relevant to the issue of whether there was a conspiracy.

There can be no dispute as to the substance of Jaffee's testimony. He testified only about his own corruption and that of Jack Glasser. He did not testify that he had any knowledge of any other unlawful activity and he in no way implicated the defendants.

But the government apparently wanted the jury to draw two inferences—both equally invalid—from Jaffee's testimony: first, that Jack Glasser's testimony was truthful not only as to the specifics of Jaffee's own corruption but on the general assertion that Glasser made payments to defendants in exchange for their cooperation in enabling manufacturers to violate the Agreement; and second, that because one Union official was corrupt, it was likely that the defendants were corrupt as well. Neither of these inferences would be proper: whether Jaffee was corrupt could have no bearing on the guilt or innocence of the defendants, since there was no allegation that he was a member of a conspiracy with the defendants. In fact, the court specifically held that the evidence would not support the conclusion that Jaffee was a member of the conspiracy alleged in the indictment (T. 1137). Nor was it proper for the court to permit the jury to infer that if Glasser paid Jaffee, he probably also paid the defendants. There is simply no evidentiary rule which permits proof of similar bad acts committed by a non-defendant non-co-conspirator to corroborate testimony as to defendants' guilt. So long as the Glasser-Jaffee payoff was not a part of the conspiracy claimed by the government, it was improper to permit the jury to consider it.

Thus, as this testimony was highly prejudicial and inflammatory—in that it suggested to the jury that Jaffee's corruption was relevant in determining the defendants' guilt or innocence—the court's denial of defendants' motion to strike it requires reversal of the convictions on all counts. See *United States* v. *Krulewitch,* 145 F.2d 76 (2d Cir. 1944), *rev'd on other grounds,* 336 U.S. 440 (1949); *Lyda* v. *United States,* 321 F.2d 788, 796 (9th Cir. 1963). See also, *McCormick, Evidence* § 185 at 438-39 (2d ed. 1972).

**B—The Hearsay Statements of Alleged Co-Conspirators Were Improperly Admitted**

Over defendants' objections, the trial court permitted Glasser to testify to numerous statements allegedly made by manufacturers to Glasser during the formation of arrangements for the alleged payoff schemes. We respectfully submit that this testimony violated basic evidentiary principles, as reaffirmed by the Supreme Court in *United States* v. *Nixon,* 42 U.S.L.W. 5237 (U.S. July 24, 1974) and this Court's holding in *United States* v. *Puco,* 476 F.2d 1099 (2d Cir.), *cert. denied,* 414 U.S. 844 (1973).

Glasser testified to his conversations with Sherman, Hessel, Cohen, Ginsberg, Schwartzbaum and Baker, of whom only Ginsberg testified at the trial. It is submitted that the court erred in permitting Glasser's hearsay testimony of the statements of the remaining manufacturers to stand because there was no independent evidence of the conspiracy charged and, further, no independent evidence of the membership of both the defendants and the declarants in it. Because of the prejudice inherent in that error, especially in the absence of limiting instructions by the court,* the convictions of all defendants should be reversed.

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* Finding a single conspiracy, the court gave no instructions limiting the jury's consideration of that testimony to any particular defendant or defendants. See Point II, *supra.*

It is well-settled that in order to admit hearsay statements of an alleged conspirator under the co-conspirator exception to the hearsay rule, the prosecution must first prove the existence of the conspiracy and that both the declarant and the defendant against whom the hearsay is offered were members of it. Both must be shown by substantial evidence independent of the hearsay, for the hearsay declarations cannot serve as the foundation for their own admissibility. This rule was most recently restated by the Supreme Court in *United States* v. *Nixon, supra*:

> "Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy. The same is true of declarations of coconspirators who are not defendants in the case on trial. *Dutton* v. *Evans*, 400 U.S. 74, 81 (1970)." 42 U.S.L.W. at 5243 and n. 14.

In this case, however, there was *no* proof—other than Glasser's own hearsay testimony—of a conspiracy of which Sherman, Hessel, Cohen, Schwartzbaum or Baker were members. Thus, allowing Glasser's testimony to be considered against all defendants, without this substantial independent, non-hearsay proof of participation of the manufacturers in the conspiracy, was improperly to permit Glasser to prove the entire conspiracy himself.

The lack of independent corroboration of Glasser's testimony as to hearsay statements of alleged co-conspirators is also contrary to this Court's holding in *United States* v. *Puco, supra*, where this Court delineated a new test to be applied by the trial court.

> "[W]hen a co-conspirator's out-of-court statement is sought to be offered without producing him, the

> trial judge must determine whether, in the circumstances of the case, that statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination." 476 F.2d at 1107.

It is submitted that there were no "indicia of reliability" of the statements Glasser attributed to Sherman, Hessel, Cohen, Schwartzbaum or Baker. Glasser did not testify any of them said that specific events would occur which later did occur, as in *Puco, supra*. Nor did the government introduce any type of corporate record, which would not have been susceptible to a claim of privilege, to substantiate any of the payments Glasser claimed to have received. None were subject to cross-examination, Baker having died and the others having been indicted.

If anything, the "indicia of reliability" showed that Glasser's hearsay testimony was not reliable. For despite his testimony that manufacturers had purchased Union protection, cross-examination disclosed a number of situations where the particular manufacturers were cited for violations of the very contractual provisions for which they had allegedly paid bribes. Thus, absent independent evidence of a conspiracy between the declarant and the defendants, the hearsay statements of the manufacturers should have been excluded.*

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* The government's contention below that the hearsay statements of the manufacturers were admissible as "verbal acts" does not survive analysis. To be admissible as a "verbal act," statements must be made contemporaneously with the non-verbal conduct. *Wigmore, Evidence* § 1776 (3d ed. 1940). Here, all the conversations with the manufacturers occurred before—sometimes weeks before—the actual act of payment by the manufacturer. Since the acts were not contemporaneous with the asserted statements, the statements are not admissible as the verbal parts of acts.

[Footnote continued on following page]

**C—The Government's "Missing Witness" Argument in Summation was Improper**

In its Requests to Charge, the government asked that the jury be told that the manufacturers who did not testify were equally available to both sides (Ct. Ex. 10, Request No. 31). The court denied the request and it reaffirmed that denial before summations were given (A. 586a-90a). In denying the request, the court specifically told defendants' counsel that he could comment on the absence of the witnesses in relation to burden of proof, but could not argue that the government could have given them immunity. By denying the government's Request to Charge, the court clearly instructed the prosecutor not to argue that the missing witnesses could have been called by the defendants and the court specifically instructed the prosecutor not to refer to the indictment of the manufacturers (A. 590a).

Nevertheless, during his summation, the prosecutor, in flagrant disregard of the court's instructions, did refer to the missing manufacturers. He said:

> "Why have they not been called to testify to that? Why didn't they simply walk up and say, 'Oh, yes, we paid Jack Glasser; it had nothing to do with the union.' *Both sides have the subpoena*

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Moreover, the "verbal acts" doctrine is applicable only to a case where the acts themselves are not disputed and where only the intent of the participants is in issue. See, *e.g.*, *National Bank of the Metropolis* v. *Kennedy*, 84 U.S. (17 Wall.) 19 (1873). But here, there was no proof—other than Glasser's own statement—that he ever received any monies from Sherman, Hessel, Cohen, Schwartzbaum or Baker at all; there were no journal entries, petty cash vouchers or other documentary evidence introduced to support his claim, and thus the act of payment itself was disputed. Therefore, the statements would do more than show intent—they would bear on the act itself. Such a situation, under *Kennedy*, *supra*, is not the function of the verbal act principle.

> *power.* It was a crime, though, and if any of these manufacturers did foresee or intend these moneys would go to union officials, you may consider whether and how probable it is that they could be called by the Government to testify" (A. 622a) (emphasis added).

Defendants motion for a mistrial was denied, but the court agreed to give an instruction in an effort to cure the error (T. 1878; A. 629a-30a).

The court then instructed the jury merely that:

> "[F]or all practical purposes the manufacturers who are said to have been involved in the alleged crimes here are not available to be called by the defendants. Indeed, they are for all practical purposes unavailable to the Government as well, since the Government has apparently chosen not to apply for immunity for them" (A. 631a).

Defendants objected to the instruction and again moved for a mistrial, which was again denied, although the court admonished the prosecutor for not observing its instructions (A. 631a-32a).

The prosecutor's statement in summation was highly improper and the court's "curative" instructions—inaccurately stating that the witnesses were "unavailable" to the government—were insufficient to cure the error.

It is well-settled that it is permissible to comment on missing witnesses only "if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction", *Graves* v. *United States,* 150 U.S. 118, 121 (1893), but that comment is improper if the witness "is equally available to the Government and is in a legal sense a stranger to the accused." *Milton* v. *United States,* 110 F.2d 556, 559 (D.C. Cir. 1940).

There was no dispute in this case that the missing manufacturers would have asserted their Fifth Amendment rights if called to testify by the defense—a fact made known to the government before his summation (A. 588a). Thus they were "in a legal sense . . . stranger[s] to the accused" and there can be no doubt that the prosecutor's comments were improper as a matter of law. See *Pennewell* v. *United States,* 353 F.2d 870, 871 (D.C. Cir. 1965). The unfairness of the prosecutor's argument is highlighted by the undisputed fact—recognized by the court below (A. 584a-89a)—that the missing witnesses were indeed available to the government had it chosen to give them so-called "use immunity". 18 U.S.C. § 6001 *et seq.** The court, however, in its "curative" instruction erroneously told the jury that the witnesses were as unavailable to the government as they were to the defense.

The argument made by the prosecutor was not only improper, but highly prejudicial, and the court's additional instruction failed to cure the prejudice. In suggesting to the jury that the defendants were afraid to call the manufacturers for fear that they might implicate the defendants, the prosecutor went right to the heart of the defense contention that Glasser kept all money given him by manufacturers. Since the prosecutor, but not the jury, knew these manufacturers would have asserted their Fifth Amendment rights if called to testify and they were unavailable to the defense, this implication was totally improper. Moreover, the prosecutor knew before his summation that rather than being afraid to call the missing manufacturers, defendants had, in fact, attempted to secure their testimony (A. 588a).

The court's additional instruction given to the jury did little to remove this prejudice: the court's instruction was in effect the same as the "witness equally unavailable" instruction originally requested by the government and

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* *Cf. Morrison* v. *United States,* 365 F.2d 521 (D.C. Cir. 1966), dealing with "transactional" immunity.

rejected by the court. It gave the jury no assistance whatever in determining what inferences, if any, could be drawn from the failure of either side to call the witnesses. Instead, the jury should have been instructed that no adverse inference could be drawn against defendants because of their failure to call the manufacturers as witnesses and that the prosecutor's comments on the point should be disregarded. See *Pennewell* v. *United States, supra,* 353 F.2d at 871.

The result of the prosecutor's argument was to prejudice the jury impermissibly against the defense case and the court's corrective instruction was inadequate to remedy the prejudice. Consequently, a new trial is mandated.

## POINT IV

**Defendants' Convictions for Tax Evasion Are Improper and Should Be Reversed.**

Defendants Stofsky (Counts 25 and 26), Hoff (Count 27) and Gold (Counts 32 and 33) stand convicted of income tax evasion, 26 U.S.C. § 7201, premised solely upon their alleged failure to report the illegal payments the government alleged they received. It is respectfully submitted that all these counts must be dismissed because of the failure of the government to observe its own regulations before the institution of prosecution for income tax evasion and that, in any event, the evidence was insufficient to sustain defendant Stofsky's conviction on Counts 25 and 26 and that defendant Gold's conviction on Count 32 must be reversed for improper venue.

### A—The Failure to Afford Defendants a Conference with Government Officials

The government was obligated by law to afford a conference with government officials prior to indictment to those defendants they intended to prosecute for tax-related offenses. No such conference was given. It is respectfully submitted that this failure warrants the reversal of the tax evasion counts, because the institution of the prosecution of these counts was defective.

Internal Revenue Service Regulation, Section 601.107 (b)(2), 26 C.F.R. § 601.107(b)(2), requires that every person who may be the subject of a recommendation for prosecution for tax-related offenses be given a conference with officials of the government to give the prospective defendant an opportunity to explain his position unless compelling reasons exist to the contrary. No such conference was ever offered to any of these defendants and there was no reason shown or asserted why it could not have been.

Once having promulgated regulations, the government may not ignore them even if such regulations were not required by the Constitution or other laws, and a prosecution predicated upon a violation of the government's own regulations must fall. *See, e.g., United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954); *United States* v. *Heffner,* 420 F.2d 809 (4th Cir. 1970); *United States* v. *Leahey,* 434 F.2d 7 (1st Cir. 1970). *See also Bonita* v. *Wirtz,* 369 F.2d 208 (D.C. Cir. 1966); *United States* v. *Short,* 240 F.2d 292 (9th Cir. 1956); *American Broadcasting Co.* v. *F.C.C.,* 179 F.2d 437 (D.C. Cir. 1949); *Nader* v. *Bork,* 366 F. Supp. 104 (D.D.C. 1973).

Although *United States* v. *Goldstein,* 342 F. Supp. 661 (E.D.N.Y. 1972), appears to hold that the faliure to hold such a conference does not render an indictment defective —and was relied upon by the lower court herein in denying defendants' pre-trial motion—that case is distinguishable from the instant one. In *Goldstein,* the government attempted to offer the defendant a conference, but the letter containing that offer was returned undelivered to the Internal Revenue Service.* In this case, no such offer was ever made. Thus, *Goldstein* does not stand for the

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* While none of the defendants other than Goldstein was offered a conference, 342 F. Supp. at 664, it appears that only Goldstein raised the issue.

proposition that no effort to offer a conference is required, but only that reasonable efforts to afford one are sufficient.

If, however, *Goldstein* is read to require no effort at all, it is submitted that it was erroneously decided. First, the court's holding that the dismissal of an indictment because of a violation of a procedure set forth in an Internal Revenue regulation would limit the plenary power of the grand jury to indict, missed the thrust of those regulations. They are aimed not at a limitation of the plenary powers of the *grand jury* but at the procedures the *prosecutor* must employ *before* presenting the case to the grand jury. Second, the *Goldstein* court's reliance on *Sullivan* v. *United States*, 348 U.S. 170 (1954) was misplaced. In that case, the Supreme Court upheld the refusal to dismiss an indictment apparently obtained in violation of a Justice Department circular letter—never promulgated as a departmental regulation—termed by the Supreme Court as "a housekeeping provision". 348 U.S. at 173. However, in *Goldstein*, as here, the provision violated was a regulation duly promulgated pursuant to the authority delegated by the Congress. As such, the government was bound to follow it and was required to offer a conference.*

For this reason the defendants' convictions on Counts 25, 26, 27, 32 and 33 must be reversed and those counts dismissed.

**B—The Evidence on Counts 25 and 26 Was Insufficient**

The only direct testimony relating to Counts 25 and 26 came from Grossman who testified that he paid money to defendant Gold pursuant to a previous arrangement with

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* Nor, as it turns out, would such a conference in this case have been merely routine. Had the government afforded the defendants a conference, and heard their contentions concerning Glasser, the Internal Revenue Service might have uncovered Glasser's suspicous finances prior to trial. See Point I, *supra*.

Stofsky. There was no testimony that defendant Stofsky ever received any part of any of the payments. Whatever the implications of such testimony are concerning defendant Stofsky's liability for aiding and abetting substantive allegations of Union bribery, it is clear that such testimony is plainly insufficient to charge defendant Stofsky with actual receipt of Grossman's payments for income tax purposes.

In order to attempt to sustain the tax evasion charges against defendant Stofsky, the government elicited testimony from Internal Revenue Agent Anthony Passaretti that in determining whether defendant Stofsky was liable for income taxes on the Grossman payments to defendant Gold, one-half of each year's payments, or $6,000, was arbitrarily allocated to defendant Stofsky. He testified that he made this allocation on the assumption that:

> "[W]here there is no evidence as to the distribution, that all items of income and deduction are to be divided equally between members of a joint venture on [sic] a partnership" (T. 1024).

It is respectfully submitted that there was no basis in the record for this completely arbitrary assumption or for the conclusion that defendant Stofsky received any of the monies allegedly paid to defendant Gold.* Yet the court permitted Mr. Passaretti to give his "expert" opinion that not only did defendant Stofsky receive a part of those monies, but that he received one-half of them.

It is well-settled that there must be evidence in the record to support an assumption made by an expert witness in giving his opinion. *Atlantic Life Ins. Co.* v. *Vaughan*, 71 F.2d 394, 395 (6th Cir. 1934) ("[I]t [is] axiomatic

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* Indeed, if any such assumption could be made, under the government's single conspiracy theory, it could only have been that all the defendants shared in all payments, and that assumption would obviously have been improper.

that [expert testimony] must be based upon conceded or proved facts, and that a naked opinion, based obviously on mere speculation and conjecture, does not rise to the dignity of evidence . . .'); *United States* v. *American Tobacco Co.*, 39 F. Supp. 957 (E.D. Ken. 1941). See also, *McCormick, Evidence*, § 15 at 34 (2d ed. 1972). We submit that there was no evidence from which Mr. Passaretti—or the jury—could conclude that defendant Stofsky evaded taxes on monies shown only to have been given to defendant Gold. Mr. Passaretti's impermissible suggestion that there was evidence in the case that defendants Stofsky and Gold shared the Grossman payments equally was severely prejudicial, since this testimony formed the sole basis for defendant Stofsky's conviction on Counts 25 and 26. Thus, those convictions should be reversed and the counts dismissed.

**C—Venue was Improper on Count 32**

Both by pretrial motion and during trial, defendant Gold moved to dismiss Count 32 for lack of proper venue, since his tax return (GX 48) disclosed that he both resided and filed in the Eastern District of New York. Both as a matter of law and as a matter of proof, the evasion charged could not have occurred solely upon the receipt of the monies, and therefore Count 32 should have been dismissed.

The government contended that venue was proper because illegal payments said to have come from manufacturers were received in the Southern District of New York and defendant Gold must have intended, upon receipt, not to report it on his income tax return filed in the next year. The legal theory advanced by the government—without citation to any authority—is without foundation.

Most tax evasion cases in which venue has been an issue have involved distinctions among the district in

which the taxpayer resided, the district where the return was prepared and the one in which the return was filed. See, *e.g., United States* v. *Slutsky,* 487 F.2d 832 (2d Cir. 1973); *United States* v. *Albanese,* 117 F. Supp. 736 (S.D. N.Y. 1954); *aff'd,* 224 F.2d 879 (2d Cir.), *cert. denied,* 350 U.S. 845 (1955); *Beaty* v. *United States,* 213 F.2d 712 (4th Cir. 1954), *judgment vacated on other grounds,* 348 U.S. 950 (1955).

The attempt to evade and defeat income tax, "the 'statutory key verbs' [which] control in determining venue," *United States* v. *Slutsky, supra,* at 839, occur not at the time the unreported income is received, but rather when the defendant prepares, signs, mails and files his income tax return failing to include a part of his income. Receipt of money, legally or illegally, does not constitute evasion of income taxes for if the money is reported on income tax returns, no evasion occurs. *Cf. United States* v. *Sullivan,* 274 U.S. 259 (1927).

Since the preparation, signing, mailing and filing of defendant Gold's allegedly false income tax return were not proven to have occurred in the Southern District of New York, the conviction on this count must be reversed.

## POINT V

**The Charge of Obstruction of Justice Is Both Factually and Legally Insufficient, and in any Event Improperly Brought in the Southern District; The Convictions on this Count Must Be Reversed and the Count Dismissed.**

Count 24 charged defendants Stofsky and Gold with obstructing justice in violation of Title 18, United States Code, Section 1503 in that they allegedly requested Glasser—who was then under grand jury subpoena—not to testify before the grand jury, offering in exchange to obtain and pay for a lawyer for him in connection with the

investigation and to provide their support and approval for Glasser's fur industry pension. Defendants' pre-trial motion to dismiss this count as failing to charge an offense was denied, as was their similar motion—additionally based on factual insufficiency as well as lack of venue—during trial (A. 39a; T. 1146-55). It is respectfully submitted that the defendants' motions should have been granted.

Dismissal of this count is required because the government failed to prove that Glasser was not legitimately permitted to assert his privilege against self-incrimination, failed to prove that the defendants "offered" Glasser a lawyer—proving instead that Glasser demanded that the defendants recommend one to him, and failed to prove that the defendants could have helped Glasser obtain a pension which documentary evidence proved he was already receiving. See pp. 14-15, *supra*.

Even assuming defendants suggested that a witness assert his privilege against self-incrimination—as Glasser testified—such a suggestion *in and of itself* is legally insufficient to constitute obstruction of justice within the meaning of 18 U.S.C. § 1503. Every person has a constitutional right to refuse to testify or give information to a grand jury by asserting his privilege against self-incrimination. A *legitimate* assertion of the privilege by a witness—the frustrations and the impatience of prosecutors notwithstanding—cannot be an "obstruction of justice", since this constitutional right of every person is an integral part of the administration of justice. Similarly, one cannot be said to have obstructed justice by suggesting to a potential witness that he may have a legitimate right to assert his privilege against self-incrimination.* While

* In view of his testimony, there can be no doubt that Glasser's assertion of the privilege in this case would have been legitimate to prevent self-incrimination concerning either obtaining money under false pretenses or, as he testified, union bribery.

it may be an "obstruction" to suggest that a witness *illegitimately* assert the Fifth Amendment knowing that such an assertion would be improper, or to suggest that a witness destroy documents or be otherwise evasive, no such conduct was ever proven by the government here. See *United States* v. *Herron*, 28 F.2d 122 (N.D. Cal. 1928).

Nothing in *Cole* v. *United States*, 329 F.2d 437 (9th Cir.), *cert. denied*, 377 U.S. 954 (1964), relied upon by the government at trial and referred to by the court in its pre-trial memorandum opinion, is inconsistent with this distinction; in fact, *Cole* recognizes it. There, the court affirmed a conviction for obstruction of justice where the defendant apparently threatened the witness, advised him to leave town, and "insisted", "implored" and "demanded" that he assert the Fifth Amendment before a grand jury without regard as to whether such an assertion would have been legitimate or not. 329 F.2d at 442. Unlike the case at bar, in *Cole* the claim of the privilege apparently was without legal foundation and could only have been asserted for the purpose of protecting the defendant. Further, the testimony in this case was only that the defendants "suggested" that Glasser assert his privilege (A. 148a), not, as in *Cole*, "demanded", "implored" or "insisted" that he do so.

Moreover, even if the allegation concerning the Fifth Amendment is legally sufficient, there still was a failure of proof in this regard, because Glasser testified that he told the defendants he had already been offered immunity—before the defendants made any suggestion to him—thus preventing his assertion of the privilege in any event (A. 103a). And, because Glasser himself asked for an attorney and was already receiving his pension, the factual underpinnings of the government's case on this count simply fell apart.

Even if the allegations and the evidence were sufficient, however, the count must nevertheless be dismissed for improper venue since the crime—if there was one—was committed in the Eastern District of New York.

There is no dispute that the conversation in Tiffie's Restaurant on April 4, 1972—forming the entire basis of Count 24—occurred in Queens County. Faced with an obvious venue problem, the government suggested below that defendant Gold's telephone call from Queens to Cammer in Manhattan constituted sufficient nexus with the Southern District to sustain its claim that venue was properly laid.* But the government never claimed that either Cammer (the Union's attorney) or Hammer (the attorney recommended by Cammer) participated in the obstruction or provided even a link in any obstruction. Rather, it was the alleged corrupt "offer" to obtain an attorney—in Queens—that was the supposed obstruction of justice. It was therefore irrelevant to the charge that defendant Gold telephoned Cammer in Manhattan. That events may have occurred in the Southern District as a result of defendant Gold's telephone call does not make the obstruction a continuing offense in the Southern District because if the offense occurred at all it was complete with the "offer". In sum, no part of the events offered to support Count 24 occurred in the Southern District of New York and venue was thus improper.

It is respectfully submitted, for all the above reasons, defendants' convictions on Count 24 must be reversed and the count dismissed.

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* The government also argued that the obstruction started weeks earlier at meetings in Manhattan, before Glasser was ever subpoenaed (T. 1154-55). But since Glaser had not yet been subpoenaed, these pre-April 4, 1972 meetings are completely irrelevant to this count since—under the explicit terms of Section 1503—no obstruction could occur prior to the time that Glasser became a subpoenaed grand jury witness.

## POINT VI

**The convictions on Count 23 must be reversed, because the statute upon which it is predicated is unconstitutional.**

Count 23 of the indictment charged defendants with violation of Title 18, United States Code, Section 1962(c). The defendants moved prior to trial for dismissal on the ground that this section was unconstitutional on its face. The District Court, in its opinion dated December 21, 1973, denied the motion, holding that: ". . . the statute is clear enough . . . [it] may be broad, but it is not vague" (A. 26a-28a). It is respectfully submitted that this statute is, in fact, unconstitutional.

Section 1962(c) states:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

While "person", "enterprise", "racketeering activity" and "pattern of racketeering activity" are defined in Section 1961, the phrase "conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity" is never defined. The terms of this statute are not sufficiently explicit to inform those who are subject to it what type of conduct on their part will render them liable to its penalties.

The statute simply does not state what relationship, if any, the "racketeering activity" must have to the "enterprise". It does not state whether the racketeering activity must be a vital and constant part of the enterprise or

whether activity barely related to the usual operation of the enterprise creates liability under the statute.

It cannot be determined whether the statute seeks to create a new crime because defendants hold official positions with a union or whether the statute requires that the predicate crime have some central, or at least important, role in the union *qua* union. The statute does not tell defendants what activity is additionally proscribed because of their union involvement, and, as such, does not enable them to make a meaningful judgment as to whether their acts are violative of this statute. As such, the statute is unconstitutional.

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand." *United States* v. *Harrison,* 347 U.S. 612, 618 (1954).

See also *Winters* v. *New York,* 333 U.S. 507 (1948) and *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961).

For these reasons we submit that Section 1962(c) is unconstitutionally vague and that defendants' convictions on Count 23 should be reversed and the Count dismissed.

## CONCLUSION

**For all the above reasons, it is respectfully submitted that the convictions of defendants Stofsky and Gold should be reversed.**

Respectfully submitted,

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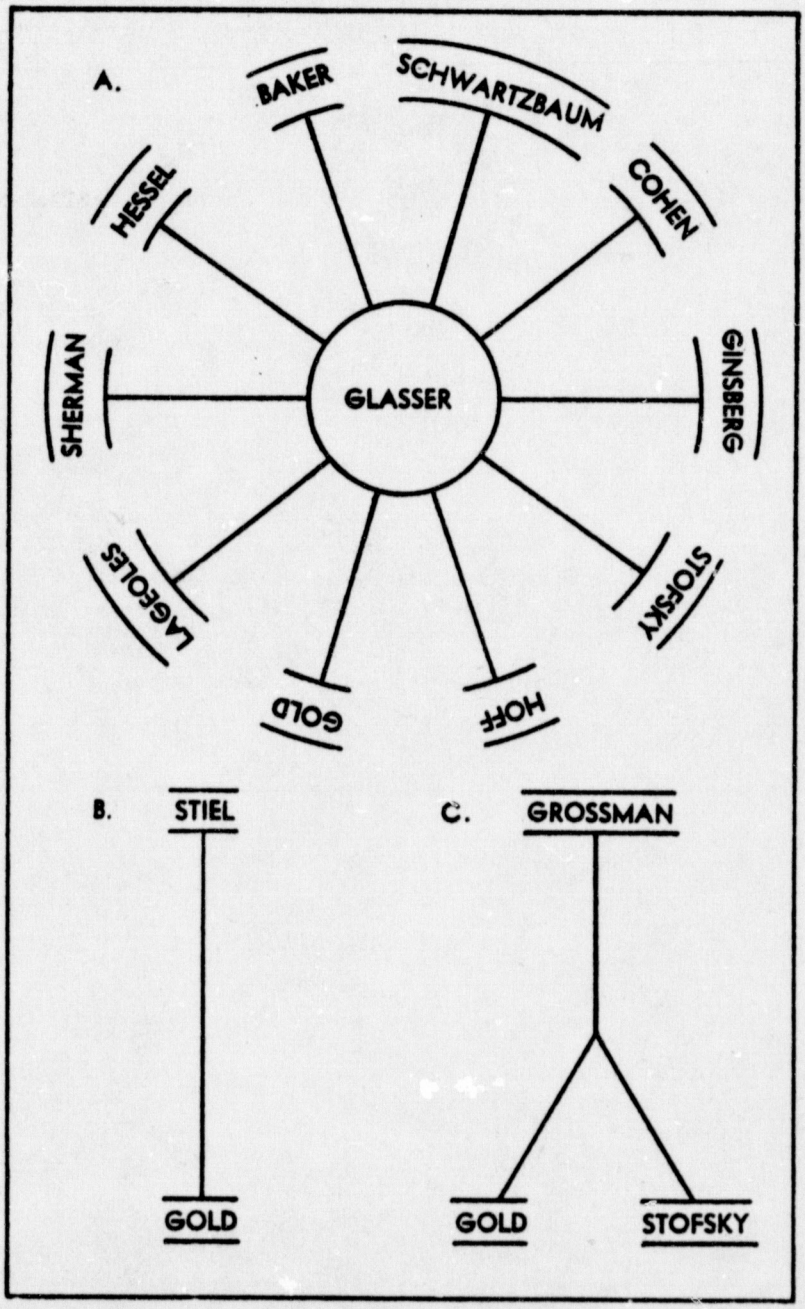
August 1, 1974

## ADDENDUM TO BRIEF

(see page 53)



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